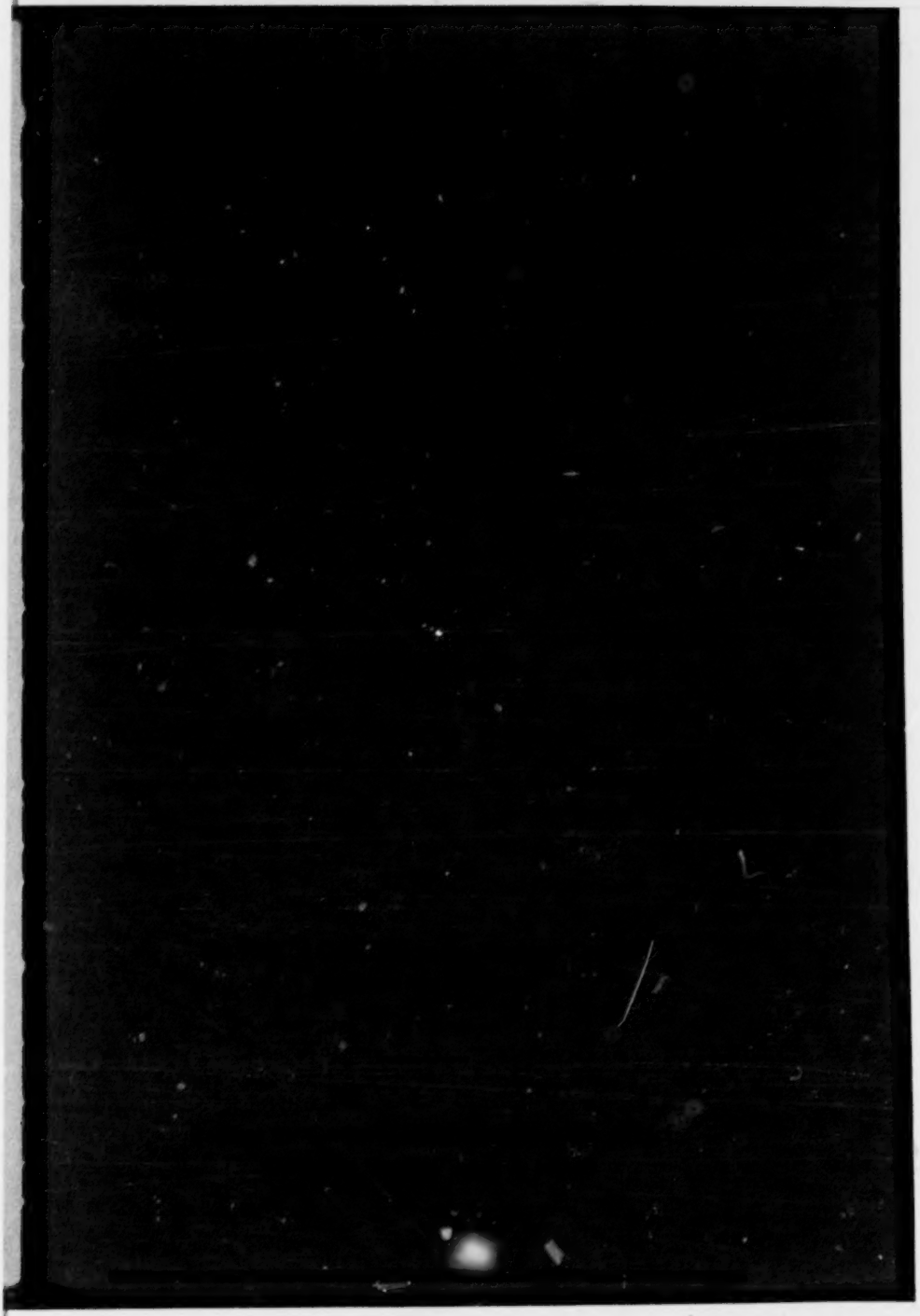

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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

APPENDIX.

INFORMATION.

Vio. Sec. 11530 H.&S. Code.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, *v.* Judith H. Krivda, and Rodger T. Minor, Defendant. S.C. No. A 234389, D.A. No. .....

The said Judith H. Krivda, Rodger T. Minor is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Violation of Section 11530, Health and Safety Code, a felony, committed as follows: That the said Judith H. Krivda, Rodger T. Minor on or about the 9th day of July, 1968, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously have possession of a narcotic, to wit, marijuana.

Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County.

Dated: Sept. 18, 1968, William G. Sharp, Clerk, by A. J. Antenorcruz, Deputy.

EVELLE J. YOUNGER, District Attorney for the County of Los Angeles, State of California

By /s/ Michael D. Marcus

MICHAEL D. MARCUS, Deputy

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MINUTES.

Superior Court of the State of California, for the County of Los Angeles.

Oct. 2, 1968.

Department No. 115.

Charles H. Older, Judge, A. W. Morris, Clerk, L. Richter, Reporter.

The People of the State of California vs. Judith H. Krivda, Rodger T. Minor. Case No. A234389.

Appearances: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by W. Holliman, Deputy.

Edmund Brown, by A. Reppy.

Each: Cause called for hearing on defendants' motion under 995 Penal Code. Motion argued and denied. Cause transferred to Department 100 and continued to October 9, 1968 at 9:00 a.m. for trial setting. Bail.

MINUTES.

Superior Court of the State of California, for the County of Los Angeles.

October 9, 1968.

Department No. 100.

George M. Dell, Judge, G. Healey, Clerk, D. Rigby, Reporter.

Appearances: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Defendant Bail	Defendant's Counsel		Date of Trial	Dept.
†A234389	†Judith H. Krivda and	E. Brown	Dec. 5, 1968	117
	†Rodger T. Minor	E. Brown	Dec. 5, 1968	117
A235589	Kathy Y. Miller	H. Miller	Oct. 29, 1968	118
†A235892	James Rufus Shields	H. Porter	Dec. 11, 1968	72
A405688	Gary Martin Attean and	Deputy Public	Dec. 3, 1968	119
	John Raeburn Reed and	Defender,		
	Steven Lester Sewell	D. Vinje		
		F. Pestana	Dec. 3, 1968	119
		L. McKissick	Dec. 3, 1968	119
A406452	John Patrick McMurry	C. Kaplon	Oct. 16, 1968	
Remanded				
A406143	Donna Lee Keever and	J. Roff by	Nov. 21, 1968	105
	aka Dora Fay Robinson	R. Lundy		
	Joseph Cody	J. Roff by	Nov. 21, 1968	105
		R. Lundy		

As to each defendant: Deputy District Attorney, A Kahanowicz and the defendant with counsel present.

Trial reset for 9 a.m. on date and in department indicated.

†The defendant is re-arraigned and pleads "Not Guilty".

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MINUTES.

Superior Court of the State of California, for the County of Los Angeles.

September 15, 1969, Department No. 117.

September 15, 1969.

Department No. 117.

Robert Firth, Judge, C. Drei, Reporter, J. F. Hanlon, Jr., Clerk.

Case No. A234389

The People of the State of California vs. Judith H. Krivda, Rodger T. Minor.

Appearances: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by Q. Clifton, Deputy.

S. Bubrick by: J. Medove.

Cause called for motion under Section 1538.5 PC.

By stipulation of all counsel and the defendant(s) personally, the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling. People's exhibit 4 (transcript of the proceedings had at the preliminary hearing) is admitted in evidence by reference.

Further proceedings are continued to October 23, 1969 at 9:00 A.M. Each: Remain on bail.

MINUTES.

Superior Court of the State of California, for the County of Los Angeles.

October 24, 1969.

Department No. 117.

Robert Firth, Judge, J. F. Hanlon, Jr., Clerk, C. Drei, Reporter, R. Norenberg, Deputy Sheriff.

The People of the State of California vs. Judith H. Krivda, Rodger T. Minor. Case No. A234389.

Appearances: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by R. Trauger, Deputy.

S. Bubrick, S. Bubrick.

1538.5 P.C. motion, previously submitted on preliminary transcript, is resumed. Minor is sworn and testifies on motion for defendant. Defendants rest. People rest. Motion is argued. Motion is denied. Cause continued to December 2, 1969 at 9:00 a.m. for trial setting. Each: Bail.

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MINUTES.

Superior Court of the State of California, for the County of Los Angeles.

December 12, 1969.

Department No. 117.

Robert Firth, Judge, A. D. Anderson, Jr. Clerk, C. Drei, Reporter.

The People of the State of California, vs. Judith H. Krivda, Roger T. Minor. Case No. A234389.

Appearances: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by Q. A. Clifton, Deputy.

S. Bubrick, S. Bubrick.

Each: Matter called to hear Motion of defendant's to reopen the motion of defendants pursuant to P.C. 1538.5. The Court finds that it has jurisdiction to reopen said motion and therefore grants motion of defendant to reopen. Motion of defendant's pursuant to P.C. 1538.5 submitted on basis of transcript of preliminary hearing, additional testimony previously heard at prior hearing, the same stipulations heretofore entered into and on the basis of the same arguments and points and authorities heretofore submitted. The motion of defendants pursuant to P.C. 1538.5 is granted. The people represent that there is no other or additional evidence, and on motion of Court, the action is dismissed in the interests of justice. Each: Bail exonerated.

NOTICE OF APPEAL, DESIGNATION OF RECORD, AND DISTRICT ATTORNEY'S REQUEST FOR COPY.

EVELLE J. YOUNGER
District Attorney of Los Angeles County
600 Hall of Justice
Los Angeles, California 90012
Telephone: 626-3888
Attorney for Plaintiff and Appellant

Superior Court of the State of California, for the County of Los Angeles.

Original Filed: Dec. 19, 1969.

People of the State of California, Plaintiff and Appellant, vs. Judith H. Krivda and Rodger T. Minor, Defendant(s) and Respondent(s). No. A-234389.

The People, plaintiff in this action, hereby appeals to the California Court of Appeal, pursuant to Penal Code Section 1238, subdivision 7, from the order of this court of December 12, 1969, suppressing evidence and dismissing this cause.

It is requested that the record on appeal include, besides the normal record, the reporter's transcript of the preliminary hearing, and the reporter's transcript of proceedings taken at the hearing on the motion to suppress evidence held on Sept. 15, Oct. 23, Oct. 24 and Dec. 12, 1969. It is further requested that an extra copy of the record on appeal be made for the District Attorney [Rule 34 and 35(a)].

Dated: December 19, 1969

EVELLE J. YOUNGER
District Attorney of
Los Angeles County
HARRY B. SONDHEIM
By /s/ Harry B. Sondheim
Deputy District Attorney
Attorney for Plaintiff and Appellant

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VIOLATION SECTION 11530—HEALTH AND SAFETY CODE.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

Hon. Clarence A. Stromwall, Judge, Pro Tempore. Division No. 33.

The People of the State of California, Plaintiff, vs. Judith H. Krivda and Rodger T. Minor, Defendant. No. A-234389.

For the People: Michael D. Marcus, Esq.
Deputy District Attorney.

For the Defendant: Edmund G. Brown, Jr., Esq.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

September 4, 1968

Los Angeles, California, Wednesday,
September 4, 1968
9:00 A. M. Session

* * *

THE COURT: People versus Judith H. Krivda and Rodger T. Minor. Are the People ready?

MR. MARCUS: People are ready, Your Honor.

THE COURT: Are you representing both defendants, Mr. Brown?

MR. BROWN: Yes, I am, Your Honor.

THE COURT: All right. Is the Defense ready?

MR. BROWN: The Defense is ready.

THE COURT: Judith H. Krivda, is that the way you pronounce it?

DEFENDANT KRIVDA: Krivda.

THE COURT: Krivda. All right. Is that your true name, young lady?

DEFENDANT KRIVDA: Yes.

THE COURT: And Rodger T. Minor, is that your true name, sir?

DEFENDANT MINOR: Yes.

THE COURT: This is the time and place set for the preliminary examination in the case of the People versus Judith H. Krivda and Rodger T. Minor, case number A-234389. [3]

This Court understands that at the arraignment, the defendants have been informed of the charges against them and have been delivered a copy of the complaint in this case and have been heretofore advised of their constitutional rights. The defendants herein are advised

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that they have certain constitutional rights, including the following:

A speedy and public trial.

To be represented by an attorney of your own choosing at all stages of the proceedings and if you are financially unable to employ counsel, you are entitled to the services of the Public Defender.

You are entitled to be confronted by the witnesses against you, to cross examine such witnesses and at all stages of the proceeding, you are entitled to the processes of this court to subpoena witnesses in your own behalf and you are entitled to be released upon reasonable bail, pending trial.

You are not required to testify or to give evidence against yourself and you may refuse to become a witness against yourself. However, if you do testify, you can then be cross examined as to the matters to which you testify.

If you are held to answer in this matter and an information is filed against you in the Superior Court, you are entitled to trial by jury or to a trial by the Court [4] without a jury.

The Court notes that the defendants Judith H. Krivda and Rodger T. Minor are present and represented by Counsel, Mr. Edmund G. Brown, Jr.

Mr. Brown, are the defendants now present and ready to proceed in this matter?

MR. BROWN: Yes, Your Honor.

THE COURT: All right. Mr. Rodger T. Minor, are you ready to proceed?

DEFENDANT MINOR: Yes.

THE COURT: And is that Mrs. or Miss Krivda?

DEFENDANT KRIVDA: Mrs.

THE COURT: Mrs. Judith H. Krivda, are you ready to proceed?

DEFENDANT KRIVDA: Yes.

THE COURT: All right. Would you call your first witness, please, Mr. Marcus?

MR. MARCUS: Officer Gates. [5]

STEPHEN C. GATES

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name, please?

WITNESS: Stephen C. Gates, S-t-e-p-h-e-n G-a-t-e-s.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. MARCUS:

Q Officer Gates, what is your occupation and assignment?

A I am a Los Angeles police officer, presently assigned to juvenile narcotics.

Q For probable cause, Officer, did you receive a telephone call on July 1st, 1968 from an individual indicating certain narcotic activities at 1901 Nolden Avenue or Street in Los Angeles?

A I did.

Q What was the essence of that phone call?

A I had received the phone call from an anonymous female who had indicated that there was two individuals residing at 1901 Nolden, a Rodger and a Judy. She gave only the first names.

She indicated that both Rodger and Judy were engaging in narcotics, that they were smoking marijuana and [6] in her words, shooting speed, which is commonly

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referred to as injecting methedrine. She indicated that there were many sex parties at that location, that there was a Lesbian living there by the name of Frankie—

MR. BROWN: Your Honor, I will object to that as being irrelevant.

MR. MARCUS: Your Honor, that would go towards probable cause.

THE COURT: Well, it's being introduced for the limited purpose of probable cause, Mr. Brown. Objection overruled.

MR. MARCUS: Thank you.

Q You may continue, Officer.

A In addition, this anonymous female indicated that both Rodger and Judy were injecting the two children that were residing at that location with methedrine. She said that she had heard this from Judy, who said that she enjoyed the effects of methedrine and that she wanted her children to also experience the feelings of being under the influence of methedrine.

Q On the basis of having received this information, what did you do, if anything?

A I and my partner Officer Marsden located the address, 1901 Nolden, took a vantage point and did observe two young female children in the front of the premises. At that time I ran a utility check at that location and [7] determined that Judy Krivda was the one paying the utilities at 1901 Nolden.

I then checked criminal records with the Los Angeles Police Department and determined that there had been three individuals by the last name of Krivda arrested in Los Angeles, one of them being Edward Joseph Krivda. Upon checking his package, I determined that he had a wife by the name of Judy.

Q Did the arrest of Joseph Krivda—excuse me. Did the records indicate what Joseph Krivda had been arrested for?

A Yes. Edward Joseph Krivda had been arrested for possession of dangerous drugs for sale and also sale of dangerous drugs.

Q On July 9th, 1968, did you return to this address at 1901 Nolden?

A I'm sorry. What was the date?

Q July 9th, 1968.

A Yes, I did.

Q Were you with anyone else at that time?

A Yes. Again I was with my partner Officer Marsden.

Q At approximately what time did you return to this address?

A It was approximately 11:00 A. M. in the morning.

Q What happened, if anything, at that time?

A At that time again we took a vantage point and [8] observed several trash barrels in front of the premises at 1901 Nolden. We observed the refuse collectors approximately a block away from the premises and just as they arrived to the premises on Nolden, we—I stopped the collectors and identified myself as a police officer and requested of them that they empty their well and that they pick up the trash in front of the premises and I pointed out that the trash cans that I wanted emptied out.

Q Officer, is this dwelling at 1901 Nolden a single family dwelling or an apartment house?

A It's a single family dwelling.

Q And are there any other dwellings nearby this particular address?

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A There's—it's a hilly terrain in that area and there is a home adjacent to that address but it's, oh, approximately twenty feet down the hill.

Q Where were these trash barrels located in relation to the address at 1901 Nolden?

A Directly in front of the premises.

Q Thank you. Now, you may continue, Officer. What did you observe as to the contents of the trash barrels, if anything?

A Well, I observed—after—

MR. BROWN: Your Honor, I'd like to make an objection. I would object that any testimony regarding the contents of the garbage can is inadmissible because the [9] garbage can is the property of someone other than the officer and there has been no testimony or evidence indicating that the officer obtained permission or the consent of the owner of that garbage can or its contents, who ever it might be at that time.

THE COURT: Well—

MR. MARCUS: Your Honor, cases indicate that officers have the right to go to areas adjacent to houses, specifically back yards, lawns, et cetera, to make observations of the contents of those premises.

THE COURT: Objection is overruled, in addition to which it would appear that perhaps trash in a trash barrel, if nothing else, is abandoned property.

MR. BROWN: May I make one further comment?

THE COURT: Yes.

MR. BROWN: Your Honor, it may be abandoned, but the fact that it's under the control of the garbage collection agency and it's a fact that they purchase that and it's theirs at that point and unless permission is obtained from a responsible person, then there's no legal way that the officers can go in and search

through it. It's one thing—the cases referred to by Mr. Marcus are cases where the police have observed in back yards and have just in plain view seen various objects, but in this instance I think that the officer is going to testify that he actually went in and rummaged around in this garbage [10] can and looked and took things out and it seems to me that that property belonged to somebody. It belonged to the garbage collection agency and under the case of People versus Martin in 45 Cal. 2nd, we can rely on the ownership of someone else, and even though it may be under the custody and possession of the garbage company, we still can rely on their property right to accept and object to unlawful searches and seizures, and so for that reason I would say that there just is no consent and, obviously, there's no warrant at this point or there's no evidence of a warrant.

MR. MARCUS: Your Honor, furthermore, Counsel I believe, is too early in utilizing this objection, if it exists at all, because no evidence has been admitted either way as to any consent, which People plan on approaching, anyway.

MR. BROWN: I would make one further point, Your Honor, citing just a couple of cases. In Bielicki versus the Superior Court, it was held that a public toilet, as long as the door was shut, was an area protected by the 4th Amendment. In Katz versus the United States, a public telephone booth, even though visible through the glass door, was also held as a protected area. Even though something that was open to the public, it had that zone of privacy, and I would submit that a man's garbage can, although not as sacred as his home, should not be subject to the [11] arbitrary intrusion of the Police Department. I think

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there should be a warrant obtained or there should be some restriction on the ability of the police to rummage around in people's garbage cans, looking for evidence, without at least getting the prior approval of a magistrate, and I think that a garbage can is a thing that an ordinary person thinks he can throw things, whether it's confidential letters or otherwise, and not have to expect that some law enforcement agency is going to sneak around and rummage around in that garbage can and look for incriminating evidence, and it seems to me that a garbage can, no less than a telephone booth or a toilet stall in a public park, should be protected by the 4th Amendment.

THE COURT: Well, it's an interesting argument, Mr. Brown. However, your objection is overruled. That's not the law as I understand the cases at this point.

MR. MARCUS: Thank you.

Q Now, Officer Gates, what happened after you observed these garbage cans?

THE COURT: You might tell us where the garbage cans were in front of the house. Where were the garbage cans in front of the house?

THE WITNESS: I believe they were in the parkway, Your Honor, in front of the house, adjacent to the sidewalk. [12]

BY MR. MARCUS:

Q Did you observe a garbage truck in the vicinity at that time?

A Yes, I had. I forget where I was regarding this instructing the refuse collector, but at any rate, I did instruct the refuse collector to empty his well of the truck.

Q Now, where did this take place?

A This was approximately half a block west of the premises.

Q And did you ask the permission of these individuals if you could check the contents of the garbage cans?

A Did I ask the collectors?

Q Yes.

A No.

Q What was the exact conversation that took place?

A I indicated to them that I was interested in looking in the contents of the trash barrels. I asked them to empty the well of their truck and to place the trash—and I pointed to the trash cans that I was interested in them dumping into their well, and then meeting me and my partner approximately one block north of the location.

Q Did the collector do the specific acts that you requested?

A Yes, he did, at which time I observed him at all [13] times during this period.

Q What did you observe specifically?

A I observed the refuse collectors drive the truck to the front of the premises. I observed them to go to the back end of the truck, take the trash barrels, place them in the well and then drive one block—approximately one block north to where we were at.

Q Had the well been emptied prior to their placing these specific garbage cans and its refuse in the well?

A Yes, they had.

Q Had you examined the well prior to that time?

A I did.

Q Was there any refuse that you could observe in the well prior to their then having taken these garbage

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cans that you indicated and emptying them into the well?

A None at all.

Q Did you then later have the occasion to examine the contents of this well?

A I did.

Q And prior to examining the contents, did you observe the collectors to empty any other garbage cans, other than the ones at the address at 1901 Nolden, into the well of this truck?

A Not between the time that they had placed the items, the trash into the well and to the time that they approached me. [14]

Q And what did you observe, if anything, as to the contents of this well?

A I noticed that there was approximately five paper sacks in the well. Upon examining the sacks, I found miscellaneous marijuana debris, marijuana seeds, approximately—

MR. BROWN: Your Honor, I will object to that, having no foundation.

THE COURT: Well, sustained. What did it appear to be, Officer? How did it appear?

THE WITNESS: The brown bags contained what appeared to be a brownish green leafy substance resembling marijuana and brown seeds resembling marijuana seeds.

MR. BROWN: Your Honor, it doesn't seem to me that there's any foundation that this man is an expert in the identification of either seeds or—

THE COURT: Well, he is not testifying as an expert, Mr. Brown. Just that to him it appeared to be.

BY MR. MARCUS:

Q Did you make any observations as to the other contents of the well at that time?

A Yes. In one particular bag we found or I found approximately four to six cigarettes, which were partially burnt. The cigarettes were wrapped in yellowish paper, contained a greenish leafy substance resembling marijuana. [15] In addition to that, I found an envelope with the name of Edward Krivda, with the address of 1901 Nolden. I also found a letter, a handwritten letter with the name Frankie mentioned in it.

Q Did you find any other articles besides those just mentioned in the well?

A There were other miscellaneous papers. I don't recall the substance of all of it.

MR. MARCUS: Your Honor, at this time I'd like to have marked for identification collectively as People's One three pieces of paper, one an envelope with the name of Eddie Krivda and the address of 1901 Nolden on the envelope. It would appear to be some advertising type mail envelope. The other is a white lined piece of paper, dated Saturday, 13th, signed by Al, written in pencil, and the other a three by five card dated Wednesday, 6-26, with the name of Rodger and Judy on the card.

THE COURT: All right. It will be so marked.

MR. MARCUS: May I approach the witness?

THE COURT: Yes.

MR. MARCUS: Thank you.

Q Officer Gates, I have here three items collectively marked for identification as People's One. Are these items which you found in the well on that date on July 9th, 1968?

A Yes, they are.

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Q And I'd like to draw your attention specifically [16] to the three by five card, marked Rodger and Judy, with other writing on it. Was this card also found in the well on that date?

A I believe it was.

Q And is this lined paper the one which had the name of Frankie on it?

A Yes, it is.

Q Are there any identifying marks on these items?

A Yes.

Q And what mark is that?

A My partner's initials, the letter W.

Q Was this initial put on the item in your presence?

A Yes.

Q Now, what happened, if anything, after you made these observations as to the contents of the well of the truck?

A Would you repeat the question?

Q What happened, if anything, after you made these observations as to the contents of the well of the truck?

A At that time I relocated myself at a vantage point and observed a male Caucasian, who was later identified as Rodger Minor, come from the premises and pick up the—

MR. BROWN: Your Honor, I didn't hear the witness. Did he say that he was identified at that time?

THE COURT: Later identified. [17]

MR. BROWN: Later.

THE WITNESS: —come from the premises and pick up the trash barrels which had contained the debris which resembled marijuana in them and take them to the front porch of the home.

BY MR. MARCUS:

Q And is that person, later identified as defendant Minor, now sitting in court?

A Yes.

Q The one whom you saw pick up the trash barrels?

A Yes.

Q Would you please point to that individual?

A Yes. He is the gentleman seated between counsel and Judy Krivda.

MR. MARCUS: Indicating the defendant Minor.

THE COURT: Yes.

BY MR. MARCUS:

Q How was the defendant Minor dressed at that time?

A He was merely wearing a towel around his waist.

Q What happened, if anything, after that?

A At that time we requested the—my partner and I requested the assistance of a uniformed sergeant, who accompanied us to the premises, at which time the uniformed officer and myself approached the front of the premises [18] while Officer Marsden stayed at the back. I was met at the front door by defendant Minor, at which time I placed him under arrest for possession of marijuana.

Q At approximately what time of day was that?

A It was approximately 2:30 in the afternoon.

Q And how was the defendant Minor dressed at that time?

A He was dressed in the same manner, with a towel wrapped around his waist.

Q Did he have any other articles of clothing on?

A Not that I recall.

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Q And you placed him under arrest at that time?

A Yes, I did.

Q For what, if you remember?

A For possession of marijuana.

Q What happened then?

A At that time the uniformed sergeant let my partner in the back door. My partner went to the upstairs portion of the home and indicated that there was a female suspect upstairs.

Q Did you observe any contents of the—

THE COURT: Just a moment. Let me interrupt you a minute.

Do you have some statement that you wish to make at this time, Mr. Brown?

MR. BROWN: Your Honor, I have some question [19] whether probable cause has been established and I'm wondering whether I should take the officer on voir dire or wait and make it on cross examination.

THE COURT: As to what? With reference to the entry?

MR. BROWN: Yes, the entry, whether it was in compliance with the Penal Code, whether there was a tie-up between the garbage can and the house.

THE COURT: You can take him on voir dire now or wait and do it under cross examination, which ever you prefer, Mr. Brown. I think perhaps it would be more orderly, at least at this stage of the proceeding, to do it on cross examination.

MR. BROWN: All right.

THE COURT: In any event, whatever objection you have based upon that, why, I will consider it at that time.

BY MR. MARCUS:

Q Officer, did you enter the house at that time after placing the defendant Minor under arrest?

A Yes.

Q What observations, if any, did you make at that time?

A Upon entering the upstairs portion of the house, I observed three cigarettes in the ash tray, wrapped in yellow paper, containing a green leafy substance resembling [20] marijuana.

Q Did you make any observations as to any other contents of the house?

A I found the water pipe located in the lower portion of the home.

MR. MARCUS: Your Honor, at this time I'd like to have marked for identification as People's Two a Los Angeles Police Department evidence envelope and its contents, the envelope identified by DR number 68-547-958. May I approach the witness?

THE COURT: Yes. The envelope and its contents may be marked People's Two.

MR. MARCUS: Thank you, Your Honor.

BY MR. MARCUS:

Q Officer, I have here People's Two for identification. Would you please take the envelope, open it and describe what you are doing?

A I am now opening the envelope by breaking the Los Angeles Police Department seal, now taking a water pipe, which is commonly used for smoking marijuana—

MR. BROWN: I will object to that last comment, Your Honor. I don't know that there's any foundation for it.

THE COURT: All right. Objection sustained.

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THE WITNESS: A package of Zig Zag wheatstraw [21] paper, a box containing numerous capsules which are maroon and gray in color, another box containing numerous capsules which are gray and maroon in color, a vial, plastic transparent vial containing what appears to be numerous marijuana seeds and a second vial, transparent, which also contains what appears to be numerous marijuana seeds. Then an envelope, marked number nine—

MR. BROWN: I don't—is the witness reading from a piece of paper?

THE COURT: Are you referring to something, Officer?

THE WITNESS: Not yet, Your Honor.

THE COURT: All right.

THE WITNESS: The envelope marked number nine contains numerous pieces of yellow paper which are rolled in a cigarette form, containing a greenish substance resembling marijuana, and a second envelope, marked number six, containing a bindle, a yellow bindle. Inside the yellow bindle is debris and seeds and yellow paper. The debris and seeds resemble—the debris resembles tobacco and marijuana, and an empty capsule, red and yellow in color.

BY MR. MARCUS:

Q Which of these contents which you have just described did you, Officer, find in or around the location at 1901 Nolden? [22]

A May I refer to my report?

THE COURT: Well, have you seen it, Mr. Brown?

MR. BROWN: No, I haven't.

MR. MARCUS: I am now handing a carbon of a property report, Los Angeles Police Department property report, to Defense Counsel.

THE COURT: Any objection to his referring to the report?

MR. BROWN: No objection.

THE COURT: Indicate where these items were found and who found them.

THE WITNESS: Yes, Your Honor. The envelope marked number nine contains the miscellaneous debris which was found by myself in the upstairs bedroom in an ash tray on a dresser.

BY MR. MARCUS:

Q What other contents of the envelope marked People's Two did you find?

A A portion of the item in envelope number seven was found in the garbage can by myself and my partner.

MR. BROWN: Your Honor—

BY MR. MARCUS:

Q Would that include—

MR. BROWN: May Judith Krivda be excused for a [23] few moments? Her child has to go to the bathroom.

THE COURT: All right. We'll take a short recess.

(Recess taken.)

THE COURT: All right. The record will reflect that both defendants are present. Will you proceed, Mr. Marcus?

BY MR. MARCUS:

Q Officer, you had just discussed that the contents of, I believe, People's—

THE COURT: He was identifying an envelope by number seven, which I don't previously recall as having—

BLEED THROUGH POOR COPY

MR. MARCUS: I think he also identified just prior to that an envelope number nine.

THE COURT: Yes, and he discussed the contents of that envelope and where he found it. Now he has some new envelope number seven.

BY MR. MARCUS:

Q Now, does that envelope have any other markings on it besides nine, Officer Gates?

A Yes, it does. It has black lettering, T-4.

Q And does the envelope marked number seven have any other markings, other than number seven?

A Yes. It's marked T-3. [24]

Q Besides these particular items, T-3 and T-4, did you find any other contents of this envelope?

A Yes. The water pipe, which I found in the front room.

Q What was the condition of the water pipe at the time that you found it in the front room?

A The same condition you see it in now.

Q Did it have any debris in it? Do you remember?

A Not that I recall.

Q Were there any contents of the pipe at the time that you found it?

A Pardon?

Q Did the pipe contain anything at the time that you found it, to the best of your memory?

A I don't recall.

Q And is this address at 1901 Nolden in the City and County of Los Angeles?

A Yes, it is.

MR. MARCUS: No further questions.

THE COURT: All right. You may cross examine, Mr. Brown.

CROSS EXAMINATION

BY MR. BROWN:

Q Officer Gates, how far is the house from the place where you noticed the trash barrels to be located? [25]

A Approximately thirty-five yards, thirty to forty yards.

Q And are there any other houses in the area?

A Yes.

Q On direct examination you testified that it appeared to you to be a single dwelling. What did you base that on?

A I based it on the appearance of the home, the structure of the premises.

Q And what was that?

A It had the physical appearance of being a single family dwelling.

Q And what are those physical characteristics?

A The size was indicative of a single family dwelling. The structure was indicative of a single family dwelling. The exterior layout was indicative of a single family dwelling.

Q And what was that size and structure and exterior layout?

A Do you want the general size?

Q Just a general description.

A It's a two-story home. I have no idea what the square footage of the home is, Counsel.

Q No. I don't mean that.

A I believe there was shakes on the outside, a front porch and a back porch. [26]

MR. BROWN: I have a photograph that I'd like to show the witness. Can we mark this as defendant's One?

THE COURT: Yes. Defendant's A.

MR. BROWN: Defendant's A.

BLEED THROUGH POOR COPY

Q I am showing you a photograph marked Defendant's A. Can you identify the dwelling that is shown in that picture?

A Yes. It appears to be the home in question.

Q Does that picture show the position of the garbage cans when you first observed the house?

A Yes, approximately.

MR. BROWN: Shall I have the Clerk mark this, Your Honor?

THE COURT: Yes. Just hand it to the Clerk.

All right. At this time I will interrupt you for a moment, Mr. Brown.

(Discussion off the record in the pending case.)

THE COURT: All right, Mr. Brown.

BY MR. BROWN:

Q Officer, you testified that you made a utility check. What utilities did you check with?

A I checked through our intelligence division, who has liaison with the utilities department. I'm not quite certain what utilities they checked. It was not—[27] as I recall, there was no telephone. It was not the telephone information. I believe it was either the water or the gas.

Q Could you explain that process by which you check the utilities?

A Well, the process that I go through is merely making a request to intelligence division by giving them the location and they in turn check with their liaison officer to that particular company.

Q But you don't know specifically which utility they found in the name of Krivda?

A It was either the gas or the water.

Q Did you testify that the informant spoke to you on the telephone?

A Yes.

Q Did she identify herself?

A No, she did not.

Q Did she say that she observed herself any unlawful activity?

A Yes, she did.

Q That she actually saw them?

A Yes.

Q You also testified that you checked on the record of an Edward Joseph Krivda.

A That's correct.

Q Did you learn whether he had been convicted or [28] merely arrested?

A I don't recall if there was a disposition on the arrest or not and I don't recall what the disposition was but—

Q Do you recall when he was arrested?

A No, I don't.

Q Do you recall if there was any indication where he was arrested, in Los Angeles County or somewhere else?

A I believe the arrest took place in the Valley, Los Angeles.

Q Did you check the telephone directory to find out if there were any Krivdas in the Valley?

A I don't believe I did.

Q You didn't check the northwest section of the phone book for any Joseph Krivdas?

A No. I had made my request via intelligence division for anyone by that name.

Q So it is possible that there may have been a number of Krivdas living in Los Angeles?

MR. MARCUS: I'd object to that question, Your Honor. It asks for a conclusion on the part of the witness.

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THE COURT: Well, of course, all things are possible, Mr. Brown. I think you might ask him to explain how he came to the conclusion that this was the particular Krivda. I think that would be a proper question. [29]

BY MR. BROWN:

Q How did you conclude that the Krivda whose arrest record you were informed about resided at 1901 Nolden Avenue?

A I concluded that from examining the package in question and at which time I found out that this Edward Joseph Krivda had a wife by the name of Judy, and then later, upon examining the garbage container, which had the name Edward Krivda.

Q Was the name Edward or was it Eddie?

A It says Eddie.

Q Did the package that you referred to state where Mr. Krivda lived?

A Yes, it did.

Q And where was that?

A I don't recall.

Q Did it state that he was married to this Judy? Is that—he had a wife named Judy?

A That's correct.

Q But you don't know the date at which this information was compiled, as of what date?

A It seemed like it was a year or several years ago.

Q Now, when you examined the contents of the garbage can, what date was that?

A That was July the 9th, 1968. [30]

Q And on what date was the telephone call from the anonymous informant?

A That was July the 1st.

Q Did you at this point make any attempt to obtain a search warrant or at any time did you obtain a search warrant?

A No, I did not.

Q On the date of July 9th, when did you first station yourself outside the premises at 1901 Nolden Avenue?

A Pardon?

Q At what point in time did you first take up a position outside 1901 Nolden Avenue?

A On the first occasion?

Q No. On July 9th.

A July 9th? That was approximately 11:00 A. M.

Q And the arrest took place at 2:30?

A That's correct.

Q And it was at 11:00 o'clock that you examined the seeds and the debris, is that correct?

A No. I think it was near noon.

Q Now, after you examined these seeds and debris, did you make any attempt to take them to a chemist to examine them?

A Later, yes.

Q On that date before you arrested the defendants?

A Before the arrest? [31]

Q Yes.

A No.

Q You didn't make any attempt to either go to a chemist or go to a magistrate to obtain a search warrant on the basis of what you found?

A No, I did not.

Q Have you had any training in the identification of plant seeds?

A Yes.

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Q In other words, when you looked at these seeds, what was it that led you to the conclusion that they resembled marijuana seeds?

A Well, my past experience, training that I have received at the Police Academy, training that I have received from experienced officers, numerous arrests that I have made in the past.

Q What other kinds of seeds—have you looked at other kinds of seeds so that you know one seed from another?

A I have looked at other kinds of seeds. I know some seeds from others.

MR. BROWN: I have some seeds in a vial here that I'd like to—

MR. MARCUS: Your Honor, I would object to the relevance of—

THE COURT: If it is in the nature of an experiment Mr. Brown, objection sustained. [32]

MR. BROWN: Well, the purpose is, Your Honor, to attempt to establish whether the seeds that the officer said that he found in the garbage can would to a reasonable man appear to be marijuana seeds and it is our contention that they look like any other seeds.

MR. MARCUS: Your Honor, the reasonable man would not necessarily receive any training as to the identification of—

THE COURT: Well, in any event, I believe the question is a subjective one with the officer. If the officer reasonably believed under the circumstances subjectively that these were seeds resembling marijuana, I think that's sufficient.

MR. BROWN: I think there has to be some reasonable basis.

THE COURT: That's assuming he was mistaken.

MR. BROWN: Well, the point that I would attempt to prove is that these seeds looked like any other seeds.

THE COURT: Assuming he was mistaken. Your question goes to the validity of the arrest, is that correct?

MR. BROWN: That's right.

THE COURT: Well, let's assume he was mistaken. Even if he were mistaken, I don't think that would invalidate the arrest.

MR. BROWN: Well, the only thing the officer had, really, was an anonymous phone call, together with some [33] seeds and some debris, and it, as we would like to show, that debris looked as much, if not more, like hand-rolled cigarettes and like ordinary bird seed or a number of other kinds of seeds, that would—at least, I think it would undermine any probable cause and would, at least, require the officer to take it before a magistrate or before a chemist.

THE COURT: Well, I think if the Deputy District Attorney Mr. Marcus feels magnanimous, I believe he may be willing to stipulate that he might have been mistaken. I don't think that would affect the probable cause.

MR. MARCUS: Probable cause would not require absolute certainty.

THE COURT: That is my understanding.

MR. BROWN: But the point is, Your Honor, we happen to have brought some hand-rolled cigarettes that are partially burnt and it is my contention that they look just like the evidence there and if that's probable cause, then anyone who smokes hand-rolled cigarettes is subject to arrest for possession of marijuana.

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THE COURT: Oh, I don't think that that necessarily follows. You know, it's the old story. All horses have four legs and all horses are animals; therefore, all animals are four-legged horses. One does not necessarily follow the other.

MR. BROWN: That's true, but in this case there's a very little substance. I'm going to get into that, just [34] exactly what he found in the garbage can and whether he was sure at that time.

THE COURT: Well, ask him the question.

BY MR. BROWN:

Q When you found the burnt cigarettes or the cigarette butts, at that time did you believe them to be marijuana?

A Yes, I did.

Q Did you have any doubt in your mind about that?

A None at all. Not in my mind.

Q You didn't say to the other officer that these might have been rolled cigarettes?

A No.

Q Did you hear him say that to you?

A No.

Q Could you show me exactly what you found in the garbage can as distinguished from inside the house?

A Yes. What is here in the bindle is what was found in the garbage can.

Q When you say bindle, are you referring to this lined piece of yellow paper?

A Yellow paper, yes.

Q I was curious as to why you call that a bindle.

A Well, when it's folded in this manner, it's referred to as a bindle. [35]

THE COURT: Did that come out of one of those envelopes marked T something or other?

THE WITNESS: Yes, Your Honor. T-3.

BY MR. BROWN:

Q And you found all that in the garbage can, is that right?

A Yes.

Q Was anything else found in the garbage can, aside from the letters and the paper, other than that, that resembled marijuana seeds?

A Not that I recall.

Q Could you explain—it says—I'm looking at the package. What is this, People's Number Two?

MR. MARCUS: Yes.

BY MR. BROWN:

Q And I notice it says, "Total number of packages, three." Would you explain what that means? What does that refer to? I seem to see many packages here.

THE COURT: Off the record. Let me interrupt you a moment, Mr. Brown.

(Discussion off the record in the pending case.)

THE COURT: All right. You may continue.

MR. BROWN: Your Honor—

THE COURT: I don't believe he's answered the [36] question.

THE WITNESS: Well, the first digit here indicates this is package number one and there is a total of three packages.

BY MR. BROWN:

Q I see. But there are many packages within this package that you are now holding?

A Well, there was these two packages or these two envelopes with the miscellaneous items, the two boxes

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and the vial and the pipe and the package containing the yellow paper.

Q What are we calling this? How are you referring to this? Does that have a number?

MR. MARCUS: Indicating the bindle.

THE WITNESS: This was T-3. This was in the envelope marked T-3.

BY MR. BROWN:

Q So we can call that T-3.

Your Honor, is it your understanding that evidence to show that the cigarette butts that are in—what did you call that, T-3?

THE WITNESS: Yes.

MR. BROWN:—in T-3 and the seeds resembled hand-rolled cigarettes? Is it your position that that's [37] irrelevant?

THE COURT: Well, I think the Deputy District Attorney would be willing to stipulate that it so resembles. All we are concerned with is what's subjective in the mind of the officer.

MR. BROWN: Well, no. I would maintain that there has to be a reasonable basis.

THE COURT: Well, yes, I agree with you, and you may question the reasonableness.

MR. BROWN: Well, I also wanted to introduce evidence that there are—

THE COURT: If you intend to embark on any experiments, why—

MR. MARCUS: I would object to any experiments as being immaterial and irrelevant.

THE COURT: I will sustain the objection.

MR. BROWN: Well, the only other point that I was going to put on—I'd like to just make the offer for the record—is that I do have government statistics

that show that there are something in the neighborhood of ten billion hand-rolled cigarettes smoked each year in the United States and that the probabilities of that being something other than that are not particularly high.

THE COURT: Well, I think that Mr. Marcus might even stipulate that that's true.

MR. MARCUS: I will stipulate, if Counsel would [38] so wish.

THE COURT: I don't think that affects the probable cause.

MR. MARCUS: Although I would query the ten billion figure, Your Honor.

MR. BROWN: I have it from the Department of Agriculture. I can show it to you.

Q One final question. Officer, did you knock at the door when you entered this house?

A No, I did not.

Q Did you announce the purpose of your entry?

A Yes.

MR. BROWN: No further questions.

MR. MARCUS: A couple further questions, Your Honor.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. MARCUS:

Q Officer, what are the colors of the cigarette wrappings on the partially burned cigarettes in the bindle which has been marked as T-3?

A Yellow paper.

Q Does your experience and training and education give you any indication as to where or when yellow papers are found on partially or fully rolled cigarettes? [39]

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A Yes.

MR. BROWN: I will object to that, Your Honor. I don't think there's any foundation.

THE COURT: It's kind of a vague question, Mr. Marcus.

MR. MARCUS: I will rephrase the question.

THE COURT: Objection sustained.

BY MR. MARCUS:

Q Officer, did you receive any instruction as to the identification of marijuana cigarettes?

A Yes, I have.

Q Did you ever make any arrest for the possession of marijuana when it was rolled in cigarette form?

A Yes, I have.

Q And at that time what was the color of the paper which was rolled on these cigarettes?

A Both in a situation where it was presented to me at formal training at the Academy and at arrests that I have made at the field, it was wrapped in yellow paper.

Q Now, at this instruction, were you shown marijuana in seed form?

A Yes.

Q And do the seeds appearing now, which have been partially or are part of the exhibit marked for identification as People's Two, do these seeds resemble those seeds [40] initially shown to you when you received your instruction?

A Yes, they do.

Q As being marijuana?

A Yes.

Q Did you have a belief at that time that the partially burned cigarettes and the seeds and debris were of a particular kind or of a particular derivation?

A The ones in question?

Q Yes.

A Yes.

Q What was your belief at the time you observed these contents, these debris?

A It was my belief that they appeared to be marijuana seeds.

Q Thank you. Now, when you first observed defendant Minor, where was he standing?

A In the doorway, front doorway.

Q Was there anything separating you from defendant Minor at that time?

A Yes. A screen door.

Q And did you talk through the screen door?

A Yes.

Q Is that when you placed the defendant under arrest?

A Yes.

MR. MARCUS: Thank you. No further questions. [41]

THE COURT: Anything further, Mr. Brown?

MR. BROWN: Well, the only thing further I have, Your Honor, is that I would really like to learn for my own edification how the officer could distinguish the debris and seeds that I have in this match box from what he has at the witness stand.

THE COURT: What relevance would it have?

MR. BROWN: The relevance it has is that the officer could not possibly form any more than a conclusion that the material that he found in the garbage can could have either been marijuana or could have been hand-rolled cigarettes, that there was no way for him to decide one way or the other.

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THE COURT: It's my understanding that that's all that is required, that that conclusion be reasonable.

MR. BROWN: Not when there are other means, that he could have taken it to a chemist.

MR. MARCUS: Well, Your Honor, under the—

MR. BROWN: He was waiting there for three hours.

MR. MARCUS: Under many cases, like People versus Superior Court, all that's required for—

THE COURT: There are a lot of cases, People versus Superior Court, Mr. —

MR. MARCUS: Excuse me. 261 ACA 797. The definition of probable cause is where exists such a state of facts as would lead a man of ordinary care and prudence [42] to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime or that, under another case, like People versus Guidry, 262 ACA 530, that there is probable cause to arrest if the information that was acted upon would cause a reasonably prudent man to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty, again just corroborating what the Court has told Defense Counsel as to what is required in the mind of the arresting officer.

THE COURT: That's my understanding of the law.

MR. BROWN: Well, Your Honor, my only point is that the Prosecution has made some attempt to taint the yellow paper that the people use for hand-rolled cigarettes with some criminality and I am saying there are ten billion of those cigarettes around. I don't know if they all have yellow paper or not, and a reasonable man at that point would only perhaps find some suspicion and at that point, since he had adequate time and evidently there was no urgency, he could have

either gone to a chemist or, at least, presented it to a magistrate.

MR. MARCUS: Your Honor, the People are not claiming that anyone in the mere possession of yellow Zig Zag papers would be subject to arrest. The People are claiming here, however, that there are other facts separate from the debris in question which led to a state [43] of mind of the officer as to the acts committed at this address and to a basis for arrest, and I think that Counsel is avoiding looking at these other facts.

Furthermore, that even if it is shown that these cigarettes could have been hand-rolled, the guilt of the party is not determined until it is also shown that these cigarettes contained a prohibited narcotic. If it is shown that the cigarettes themselves contain only tobacco, then the parties cannot be found guilty of a crime and I think that this is the question which perhaps Counsel is getting at and avoiding or ignoring at this time.

MR. BROWN: Well, the only point is that I think the police should not be able to arrest everyone who has hand-rolled cigarettes in his garbage can.

THE COURT: I think what you say is true.

MR. BROWN: Even adding an anonymous tip to it.

THE COURT: No. I think when you start adding things to it, Mr. Brown, you get what we call probable cause, and I think we have it in this case, at least at this point.

Any further questions? I have a few questions that I want to ask the officer.

MR. BROWN: No, other than the fact that I still would—I just want to make clear for the record that I have made an offer to show debris and seeds that—[44]

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THE COURT: That you want to conduct an experiment?

MR. BROWN: Yes, and you don't want that.

THE COURT: All right. Your request to conduct an experiment to test the ability of the officer to differentiate between marijuana seeds and some other type of seeds—

MR. BROWN: And marijuana butts and hand-rolled cigarette butts.

THE COURT: All right. Well, your request is denied.

What type of collection outfit was this? Was it city collection or private collection?

THE WITNESS: Yes. It's municipal, Your Honor.

THE COURT: All right. When you went up to the door, did you have a uniformed sergeant with you?

THE WITNESS: Yes, I did.

THE COURT: Who knocked on the door?

THE WITNESS: Neither of us knocked on the door. It was a matter of being met by the defendant as we approached the door, the screen door.

THE COURT: The defendant Mr. Minor came to the door as you came up to the door?

THE WITNESS: Yes.

THE COURT: Was the screen door closed?

THE WITNESS: Yes, it was. [45]

THE COURT: Was the door inside—was there another door, other than the screen door?

THE WITNESS: Yes.

THE COURT: Was that open?

THE WITNESS: Yes.

THE COURT: And Mr. Minor came up to the screen door?

THE WITNESS: Yes.

THE COURT: Who said what to whom?

THE WITNESS: I informed him that he was—

THE COURT: Well, what did you tell him?

THE WITNESS: I told him that he was under arrest for possession of marijuana.

THE COURT: And what did he say?

THE WITNESS: He said nothing, at which time I entered.

THE COURT: Did you open the door?

THE WITNESS: Yes.

THE COURT: Did you go in?

THE WITNESS: Yes.

THE COURT: Did you place him under arrest?

THE WITNESS: Yes.

THE COURT: And then I think you indicated that the police uniformed sergeant went and let your partner in the back door?

THE WITNESS: That's correct. [46]

THE COURT: And then what happened?

THE WITNESS: I was checking the downstairs portion of the apartment.

THE COURT: Well, teli us what did you do with the defendant Minor?

THE WITNESS: Placed the handcuffs on him.

THE COURT: Did you sit him down somewhere?

THE WITNESS: Sat him in a chair and watched him, and at the same time, I was checking the downstairs portion of the house.

THE COURT: What did the downstairs portion of the house consist of?

THE WITNESS: Living room, kitchen, back porch. I believe there was a back bedroom, bathroom.

THE COURT: Did you find anything downstairs?

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THE WITNESS: Downstairs I found the water pipes. My partner found—

THE COURT: Where did you find the water pipes?

THE WITNESS: In the living room.

THE COURT: Where in the living room?

THE WITNESS: I believe it was on a bookcase. I don't recall what it was on but—

THE COURT: What else did you find downstairs?

THE WITNESS: I personally found nothing else downstairs.

THE COURT: All right. And your partner went [47] upstairs, is that correct?

THE WITNESS: Yes.

THE COURT: All right. With reference to the Zig Zag papers, who found those?

THE WITNESS: I believe my partner did, Officer Marsden.

THE COURT: All right. How about the two boxes of capsules? Who found those?

THE WITNESS: Officer Marsden.

THE COURT: All right. How about the two vials containing seeds? Did you find either of those?

THE WITNESS: No, I did not.

THE COURT: All right. There are two envelopes. Apparently one is marked T-3 and one is marked—

THE WITNESS: T-4.

THE COURT: T-4. All right. T-3 is the one that contains the debris recovered from the trash?

THE WITNESS: That's correct.

THE COURT: All right. T-4 contains something that was apparently found in the upstairs bedroom, is that correct?

THE WITNESS: That's correct.

THE COURT: You didn't find that, is that right?

THE WITNESS: Yes, I did.

THE COURT: You found that?

THE WITNESS: Yes. [48]

THE COURT: Then you did go upstairs?

THE WITNESS: Yes.

THE COURT: All right. When did you go upstairs?

THE WITNESS: Approximately two minutes after entering the premises.

THE COURT: All right. And who stayed with the defendant Minor?

THE WITNESS: The uniformed sergeant.

THE COURT: All right. And what's upstairs?

THE WITNESS: Upstairs, several bedrooms. I believe there's two bedrooms upstairs.

THE COURT: And was the defendant Krivda in one of them?

THE WITNESS: Yes.

THE COURT: And is that where you found the items contained in T-4?

THE WITNESS: Yes.

THE COURT: And where was it that you found them?

THE WITNESS: The items in T-4 were found in an ash tray on a dresser in the bedroom upstairs.

THE COURT: Which defendant Krivda was in?

THE WITNESS: Yes.

THE COURT: All right. Now, there's an envelope marked number six there. Am I confused or is there such an envelope? Apparently it's—is that the same as T-3?

THE WITNESS: T-3. I believe I said six and I [49] believe it's seven. I think at one point in my testimony I did say six.

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THE COURT: All right. In any event, to resolve any confusion, the—

THE WITNESS: Number seven is T-3.

THE COURT: Number seven is T-3. There is no number six per se, is that correct?

THE WITNESS: Number six would be the vials in our evidence report.

THE COURT: All right. Did you place the defendant Krivda under arrest, also?

THE WITNESS: Yes, I did.

THE COURT: Anything further, Mr. Marcus?

MR. MARCUS: No, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: Nothing further.

THE COURT: All right. You are excused, Officer. At this time we'll take our noon recess, and how many more witnesses do you have?

MR. MARCUS: One, Your Honor.

THE COURT: The other officer? All right. We'll continue until—

MR. BROWN: Your Honor, I have one witness that will only take about five minutes.

THE COURT: Well, he will be a Defense witness, will he not? [50]

MR. BROWN: Yes.

THE COURT: You may find that it is not necessary Mr. Brown. Let's wait and take it in proper order. I think it might be better.

All witnesses and defendants in connection with this case are directed to return at 1:30. [51]

* * *

Los Angeles, California, Wednesday,
September 4, 1968
1:30 P.M. Session

* * *

THE COURT: People versus Judith H. Krivda and Rodger T. Minor. The record will indicate that the defendants are present in the courtroom with counsel.

Will you proceed, Mr. Marcus?

MR. MARCUS: Thank you. Officer Marsden.

WILLIAM MARSDEN

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name, please?

THE WITNESS: William Marsden, M-a-r-s-d-e-n.

THE CLERK: Thank you, sir.

DIRECT EXAMINATION

BY MR. MARCUS:

Q Officer Marsden, what is your occupation and assignment?

A Police officer for the City of Los Angeles, assigned to juvenile narcotics.

Q Officer Marsden, were you present with Officer Gates at the 1901 Nolden Street address on July 9, 1968? [52]

A I was.

Q At approximately 2:30 P. M. on that date, where were you?

A Standing at the rear of the residence at 1901 Nolden.

Q Did you ever enter that residence?

A I did.

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Q And when was that?

A I was ushered into the residence by a uniformed sergeant.

Q What happened, if anything, after you entered the residence?

A I went immediately upstairs.

Q What observations did you make at the upstairs portion of this residence?

A I observed the defendant Judy Krivda.

Q Did you make any other observations at that time?

A Not at that time. My partner Sergeant Gates joined me there after a brief moment. He searched and I searched and I was present when he found certain articles in an ash tray.

Q Did you find any articles at all in the residence?

A Yes, I did.

Q What did you find?

A I found two Zig Zag packages, one with Zig Zag papers inside. The other one was empty. This was in the [53] upstairs.

Q Are those Zig Zag papers found before you?

A Yes. They have my initial W written on them.

Q Were those the papers which your fellow officer had found in the envelope marked for identification as People's One, which you have previously testified to?

A I believe it was One, yes.

Q Excuse me. Two, I believe.

THE COURT: Contained in People's Two.

MR. MARCUS: Was it People's Two, Your Honor?

THE COURT: Yes.

BY MR. MARCUS:

Q Were there any other items which you found at that residence?

A Yes, there was. I found seeds, which appeared to me to be and to resemble marijuana seeds. I found these in the bathroom, located in a cabinet, and they were inside a douche bag.

Q Do those seeds appear before you at this time?

A They do. They're identified with my initial W on the top.

Q Are they in two vials, clear plastic vials?

A They are.

Q And were both contents of both vials found in this douche bag? [54]

A Correct.

Q Did you find any other articles in the house at this time?

A I observed sitting on a shelf in the front room, after which my partner had pointed it out to me, what appeared to be a smoking pipe or a water pipe. I removed the water pipe from the shelf and in doing so, I noticed that located inside of the bowl was a small quantity of plant material and located in the bottom of the smoking pipe was a liquid, when I smelled and then disposed of.

Q Does that pipe appear also as part of the items collectively marked for identification as People's Two?

A I don't know if it's People's Two but it was identified earlier in the testimony.

Q Well, does that pipe now appear before you?

A It does.

Q After finding these articles, did you find any other contents of the location?

A Yes. Located in the kitchen, I found numerous pills, of which I did not know the origin. I also found two pieces of paper, one a receipt with the name Judy Krivda on it. I also found a Department of Water and

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Power, I believe, utility bill with the name Judith Krivda on it, including the address 1901 Nolden.

MR. MARCUS: Your Honor, at this time I'd like to have marked for identification as Peoples' Three two [55] items, what would appear to be a receipt dated June 25th, 1968, with the name of defendant Judy Krivda for the amount of $75.00, indicating it is for rent at the address of 1901 Nolden Street, and a closing bill for the Department of Water and Power, addressed to Judith H. Krivda at 1901 Nolden Street.

THE COURT: All right. That may be so marked.

MR. MARCUS: Thank you. May I approach the witness?

THE COURT: Yes.

BY MR. MARCUS:

Q Officer Marsden, I have here two items which have been collectively marked for identification as People's Three. Are these the rent receipt and the water and power bill which you observed to be in that residence?

A Yes, it is or they are.

Q Was defendant Krivda placed under arrest at this time?

A I don't recall if it was at this time or at a later time. She was in the process of getting dressed when I first entered into the upstairs bedroom.

Q Officer, what was done with all these items after they were found at the location, specifically, the seeds, the water pipe, the items marked as T-3 and T-4 and the other items which now appear before you? [56]

A Each of the items that have been removed from this package and the pieces of paper I took into custody. In the case of the water pipe, the seeds, the different pills, the different debris, I placed them in-

side a manila envelope. I filled the front of the manila envelope out, I sealed the rear of the envelope with my signature, the date, my serial number, and I booked it into the Property Section of the Los Angeles Police Department.

Q When did you next see this envelope?

A This morning, 9:00 o'clock.

Q And did you bring it directly to court with you at that time?

A I did.

MR. MARCUS: No further questions.

CROSS EXAMINATION

BY MR. BROWN:

Q How long did you conduct a search of the premises which you have discussed so far in your testimony?

A I would estimate between a half hour and forty-five minutes.

Q Did you enter the dwelling through the rear?

A Yes, I did.

Q Did you notice that there was another dwelling behind that, behind the dwelling that you entered?

A There progresses up the hill, I think, three [57] different structures, the first one being like a shed, which I am sure is on the same property as the house in which the two defendants were residing. Behind that is a portion of a residence which had been gutted by a fire, and higher up the hill was a residence which was surrounded by a fence.

Q When you say you are sure that it belonged on the same property, what property are you referring to?

A I am referring to the property at 1901 Nolden.

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Q And are you able to tell exactly what the limits of that property are, where the property line begins and ends?

A There is a fence directly behind this wooden shed which is located—which appears to be located at the rear of 1901 Nolden.

Q Is there any fence around this house that you indicate is at 1901 Nolden?

A Not that I recall.

MR. BROWN: I have no further questions.

MR. MARCUS: No redirect, Your Honor.

THE COURT: I have nothing further.

MR. BROWN: The problem is, Your Honor, some of that stuff looks like tobacco and I don't know how much of the quantity is marijuana.

THE COURT: All right. Well, then, why don't we get the chemist? [58]

MR. MARCUS: May we recess the case at this time?

THE COURT: All right. Let's take a short recess at this time in this case.

MR. MARCUS: Your Honor, may the officers be excused?

THE COURT: Do you want the officers any further?

MR. BROWN: No, I don't see any need.

THE COURT: All right. The officers may be excused.

MR. MARCUS: Very well. Also, for the record, Counsel for the defendant did open one of the cigarettes, the burnt cigarettes, and examined the contents, and part of it, I believe, fell out into the bindle, the yellow bindle.

MR. BROWN: Yes.

THE COURT: All right. We'll take a short recess, pending the attendance of the chemist.

(Recess taken.) [59]

* * *

THE COURT: All right. People versus Judith H. Krivda and Rodger T. Minor. The record will reflect that both defendants are present with counsel.

Are you ready to proceed, Mr. Marcus?

MR. MARCUS: Mr. Taylor.

CHARLES STANLEY TAYLOR

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you state your full name, please?

THE WITNESS: Charles Stanley Taylor.

DIRECT EXAMINATION

BY MR. MARCUS:

Q Mr. Taylor, what is your occupation?

A I am a chemist, employed by the Los Angeles Police Department.

Q How long have you been employed by the Police Department?

A About two and a half years.

Q As a chemist, that is?

A Yes, sir.

Q Prior to that employment, were you employed by anyone else?

A Yes, sir.

Q Who was that by? [60]

A I worked for Ralston Purina Company. I worked for the Air Pollution Control District.

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Q And how were you employed by these other two people, two other companies?

A As an analytical chemist.

Q What school did you go to for your chemical degree?

THE COURT: Why don't you just give us your qualifications and your background, Mr. Taylor, with reference to qualifying yourself as an expert forensic chemist?

THE WITNESS: I have a Bachelor of Science degree from the University of Washington in chemistry and approximately nine years experience as an analytical chemist.

BY MR. MARCUS:

Q Now, during this two and a half year period with the Los Angeles Police Department, have you had the opportunity to examine marijuana in various forms, such as seeds, debris, cigarettes and larger quantities in other types of sizes?

A Yes, sir.

Q Approximately how many times have you examined marijuana during this last two and a half years?

A Oh, I would estimate between five and ten [61] thousand times.

Q How many stipulation forms have you prepared for preliminaries?

A Three, four, five thousand. I don't know.

Q Have you ever qualified as an expert in the Superior Courts of the County of Los Angeles?

A Yes, sir.

Q Was this for the purpose of identifying marijuana?

A Some of it.

Q Approximately how many times did you qualify as an expert in the Superior Courts of the County of Los Angeles for the purpose of identifying marijuana?

A Possibly sixty or seventy times.

MR. MARCUS: Your Honor, may I approach the witness?

THE COURT: Yes. Anything further with reference to his qualifications, Mr. Marcus?

MR. MARCUS: No, Your Honor.

THE COURT: All right. Mr. Brown, would you like to examine the chemist with reference to his qualifications?

MR. BROWN: Not with respect to his qualifications.

THE COURT: Do you stipulate he is an expert forensic chemist?

MR. BROWN: Yes, Your Honor.

THE COURT: For the purpose of these proceedings? [62]

MR. BROWN: Yes, Your Honor.

THE COURT: All right.

BY MR. MARCUS:

Q Mr. Taylor, I have several articles in my hand, plus an envelope, which has been marked for identification as People's Two. Have you ever seen this envelope before?

A Yes, sir.

Q Does your signature appear on any part of this envelope?

A Yes, sir, it does.

Q Now, I would like to direct your attention to the articles which I have also brought to the witness stand. Do you recognize these articles?

A Yes, sir.

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Q Have you ever seen them before?

A Yes, sir.

Q Now, I would like to direct your attention first to a yellow piece of paper, which has been previously identified as a bindle. I would like you to examine the contents of this bindle.

THE COURT: Does that come from T-3?

MR. MARCUS: T-3, Your Honor.

Q And tell me, Mr. Taylor, based upon your experience, what do you find the contents to be as to their chemical makeup or identification? [63]

A Well, there's numerous marijuana seeds in here. There is approximately seven or eight cigarette butts containing marijuana.

Q Now, I'd like you to take a look at an envelope marked T-4.

THE COURT: Let's not confuse it there. Close that one up before you open the other one.

BY MR. MARCUS:

Q Mr. Taylor, I'd like you to take a look now at the contents of T-4 and tell me what you find these contents to be as far as chemical composition.

A There's a quantity of cigarette butts and miscellaneous debris, a total weight of about half a gram, which contains marijuana.

Q Now, I'd like you to take a look at the items which have been marked for identification as part of People's Two and marked as T-2, two plastic vials, clear plastic vials. What are the chemical compositions of these particular seeds?

A These are marijuana seeds.

Q Finally, Mr. Taylor, do you remember making any examinations of this particular water pipe?

A I have no recollection of it, other than what I can read on this report.

Q What do you read on the report as to this [64] particular pipe?

A It is a pipe that contains marijuana residue.

MR. MARCUS: Thank you. No further questions.

THE COURT: All right. Mr. Brown.

CROSS EXAMINATION

BY MR. BROWN:

Q Directing your attention, sir, to the yellow piece of paper which has sometimes been referred to as a bindle, you stated that that contained marijuana. Is it your testimony that all the debris, other than the paper, is marijuana?

A I would say most of it is.

Q Is there any other substance there?

A There's a plastic capsule here, miscellaneous other debris.

Q How do you arrive at the conclusion that all that was marijuana debris as opposed to, for example, ordinary tobacco?

MR. MARCUS: Your Honor, I object to the question. It assumes facts not in evidence.

THE COURT: Overruled.

MR. MARCUS: Not testified to, also, by the witness.

THE COURT: Overruled.

THE WITNESS: I ran a chemical test upon this material. [65]

BY MR. BROWN:

Q All the material or just a couple of grains of it?

A Just a few pieces.

Q Well, how are you able to make a determination

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from a couple of, whether it be a grain or a small fragment of a leaf, as to the other parts?

A I took what I considered to be a representative sample of this, placed it under a microscope and also performed chemical tests on it.

MR. BROWN: Can I approach the bench?

THE COURT: Yes.

BY MR. BROWN:

Q So it is your testimony that this brown substance there is marijuana?

MR. MARCUS: Indicating some substance in the yellow bindle.

THE WITNESS: No, sir. I didn't say that all of this was marijuana. I said that there was—it is mostly marijuana.

BY MR. BROWN:

Q Well, you notice there's a good part of this brown substance.

MR. MARCUS: I'd object to that statement, a [66] great part.

THE COURT: Well, I think you can ask Mr. Taylor the question, rather than make a statement, Mr. Brown.

MR. BROWN: All right.

Q Then distinguishing what appears to me, anyway, to be a light brown substance from the other debris, how would you characterize that?

A It looks like tobacco to me.

MR. BROWN: No further—

Q Now, with respect to—I do have some more questions.

With respect to T-4, I want to again show you the—I have in my hand the substance that I have taken out of the bag.

MR. MARCUS: Your Honor, I would object again to the introduction of these particular items as being irrelevant and immaterial.

THE COURT: Overruled. Ask your question, Mr. Brown.

BY MR. BROWN:

Q Would you look at the—it looks to me like a brown kind of a leafy substance. Would you comment on what substance you think that is?

A It appears to be tobacco.

MR. MARCUS: May the record please indicate that [67] Counsel had taken the substance from a small envelope in his possession?

THE COURT: All right. Dump it out on that piece of paper and put it back in the envelope.

BY MR. BROWN:

Q Then with respect to the two vials of seeds, you examined some of the seeds in each one?

A Yes, sir.

Q And on the basis of that, you concluded that all the seeds were marijuana seeds?

A Yes, sir.

MR. BROWN: No further questions.

MR. MARCUS: Your Honor, I'd like to just correct the one statement I made as to the little envelope. It did not come from Counsel's possession but was one of the items marked collectively as People's One.

THE COURT: People's Two.

MR. MARCUS: Excuse me. People's Two. No redirect, Your Honor.

THE COURT: Let me ask you a question, Mr. Taylor. In the process of examining this, tell us what you do.

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THE WITNESS: Are you talking about just in general?

THE COURT: Just when you examine marijuana, what do you do? [68]

THE WITNESS: I do a chemical test on it.

THE COURT: What's the chemical test?

THE WITNESS: It's known as the Duquenois test.

THE COURT: Of what does that consist?

THE WITNESS: It consists of applying a few drops of this Duquenois reagent to marijuana in a test tube, followed by a few drops of concentrated hydrochloric acid, followed by approximately one cubic centimeter of chloroform. If a purple color in the lower layer results, this is the test for marijuana.

THE COURT: What happens to the portion that you examine?

THE WITNESS: It is destroyed in the analysis.

THE COURT: In other words, what you are saying is that if you tested it all that you'd wind up destroying it all, is that correct?

THE WITNESS: Yes, sir.

THE COURT: That's the reason you test just a representative sample?

THE WITNESS: Yes, sir.

THE COURT: Did you do that with all of the items that you testified to there?

THE WITNESS: Yes, sir.

THE COURT: Anything further, Mr. Brown?

MR. BROWN: Nothing further, Your Honor.

THE COURT: Anything further, Mr. Marcus? [69]

MR. MARCUS: No, Your Honor.

THE COURT: All right. Thank you very much, Mr. Taylor.

MR. MARCUS: Your Honor, the People at this time would like to have People's One, Two and Three, heretofore marked for identification, to be received into evidence.

THE COURT: Any objection, Mr. Brown?

MR. BROWN: I would object, Your Honor, on the basis that it was an illegal search and seizure, that there was no probable cause, that there was no compliance with Section 844 of the Penal Code with reference to the entry into the house and that there's nothing to connect up the defendants Rodger Minor or Judith Krivda or either of them with the items.

THE COURT: All right. Any comment, Mr. Marcus?

MR. MARCUS: Yes, Your Honor. As far as probable cause goes, I would like to cite three different cases for the proposition that where someone receives information from an untested informant that it is sufficient if that information is later corroborated by other facts, sources or circumstances. In this particular case we do have corroboration to provide probable cause for the arrest of first defendant Minor and then defendant Krivda.

Specifically, we have the fact that the officers observed two young children in the area of the address after having first received information that there were young [70] children present at that address. A utility check showed that one Judy Krivda was registered as the person using utilities at that address, after having been told that a Judy was at that address.

Criminal records showed that there were three Krivdas arrested for some violations in the County of Los Angeles and Edward Joseph Krivda had been arrested for two drug violations and that this same Edward Joseph Krivda had a wife named Judy. The informa-

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tion received from the untested informant was that there was certain narcotics activity at this address.

Furthermore, the officers corroborated this information by sifting, in a sense, the contents of a trash barrel prior to entering the location and formed the opinion at that time that the contents appeared to be marijuana and other debris. Based upon these facts, the officers had probable cause to make the arrest.

Now, bringing my attention to Section 844, there is no violation of Section 844, since defendant Minor was at the door at the time the officers placed him under arrest. They were on one side of the screen door. He was on the other. They placed him under arrest. 844 doesn't apply.

Finally, as to the possession element itself, defendant Minor was observed to go out to the trash area, wrapped or dressed only in a towel. Then later on he was [71] arrested dressed again only in a towel. This would show some evidence of the fact that he was staying or, at least, in some repose at this address.

As far as proving possession on the part of defendant Krivda, we have the rent receipt for that address. We have a receipt from the Water and Power Company. Furthermore, both defendants were found at the residence at the time.

Finally, it is not necessary that people show exclusive possession of a residence to show possession of a narcotic. I would direct the Court's attention as to this proposition to the latest case on possession in the advance sheets, People versus Kortopets, 264 ACA 209. Based on all these arguments, Your Honor, I feel that the People have shown not only probable cause to arrest the defendants, but the right to enter the premises and to make a further search of the contents of that

premises. Furthermore, the facts do show that both defendants for the purposes of the preliminary hearing can be shown to have had either constructive or actual possession of the marijuana. On this basis, the People would then submit any further arguments.

THE COURT: All right. Anything further, Mr. Brown?

MR. BROWN: Yes. I would like to make some further argument. [72]

THE COURT: Yes. Go ahead.

MR. BROWN: One thing, I would like to argue somewhat from this photograph that has not been introduced into evidence but is Defendant's A and could it be introduced at this time?

THE COURT: Well, let me see it. Let me hear your argument with reference to the photograph.

MR. BROWN: Addressing myself to just the points that were raised by the Prosecution, as far as the corroborating factors, I would have this to say. In addition to the anonymous tip, the officers evidently had obtained information about an arrest record of Edward Joseph Krivda. The anonymous tip made no reference to an Edward Joseph. Not only that, that the arrest was for possession of pills of some kind and the tip referred to marijuana. It also referred to methedrine, but when they got down to the garbage can, they saw a substance which, at least, resembled marijuana, but be that as it may, it was a mere arrest and also Gates testified that he didn't exactly recall when the arrest was made but it was one or several years ago. I believe that was his exact testimony.

When the officers actually arrested Mr. Minor, they made no attempt to identify Mr. Minor as being the Edward Krivda in question in the arrest record. There

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was no testimony as to what this Mr. Krivda looked like. There was a letter in the garbage can belonging to Eddie Krivda, [73] however, but as I said, they made no attempt to ask Mr. Minor who he was or whether Mr. Minor is taller or shorter than this alleged Mr. Krivda.

Also, I would point out just in general that as Your Honor will notice from that photograph that Officer Gates identified as being the premises in question and also that the garbage can was in the general area in the picture where he saw it when he approached the house, that there's no real tie-in between that garbage can and the house. There was testimony by Officer Marsden that there was a fenced house to the rear of the premises. I think Officer Gates testified as to some type of premises in front of it and you will—

THE COURT: As I recall the testimony, Sergeant Gates observed the person who was later identified as Mr. Minor going out and getting the can and bringing it back to the front porch.

MR. BROWN: That's right, but he didn't observe him taking it out there or there was no testimony as to how long it had been there. There's no real testimony that that garbage can is on the property of the defendants or if anyone else could have used it. There seems to be—from the picture, it looks like the garbage can can't really be seen from the house so it would have been very easy for someone else to have placed this debris and the seeds, whatever it might have been, into the garbage can. [74] There doesn't seem to be really a great deal of connection—and I'm speaking now with respect to Mr. Minor—any real connection with himself, other than the fact that he picked up the garbage can.

It takes a little more than mere presence. There has to be a knowing possession and dominion, and since the home, there was some evidence to show that it belonged to Judith Krivda, there was absolutely none to suggest that the home or the garbage can or anything else belonged to Mr. Minor or how long he had been there, other than the couple of hours that the officers were looking, so at the very least, I would say there has been no evidence of any tie-in with Mr. Minor and that this definitely seems to be a case of non-exclusive access, in view of the fact there are other dwellings and anyone else could have thrown it in.

Also, I don't think there has really been sufficient proof that this is a single dwelling involved here. There is a letter in the garbage can that evidently was not written by or to either of the defendants involved here so there may be other parties involved.

With respect to what kind of evidence will sustain a charge of possession, I would like to cite a couple of cases. People versus Hancock, 156 Cal App 2nd 305, People versus Antista, 129 Cal App 2nd 47. In both these cases, the defendants were found upon premises where [75] narcotics were located but the Court held that there wasn't enough evidence to show a knowing possession or dominion over the narcotics and that mere presence was not enough.

Also, in another case, People versus Stanford, 176 Cal App 2nd 388, the defendant was found actually—let's see. He was in the bathroom where a sale had taken place but that wasn't enough to connect him up, either, and the Court has generally held that where you have non-exclusive access, you have got to have something in addition to the mere presence, and in People versus Redrick, 55 Cal 2nd 282, the Court

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articulated some of the additional factors that are required to convert mere presence of a narcotic into knowing possession and one of them was that the narcotics were found among the personal effects of the defendant, that there was a consciousness of guilt because of flight, false statements, evasive statements or suspicious behavior or that the defendant was a narcotic user or that defendant had recently been in possession of narcotics. Now, none of these four factors that were articulated are present in this case. In fact, there's nothing to show that the defendants knew about any of these items.

With respect to Mr. Minor, all the evidence with the exception of the water pipe was found evidently upstairs. Mr. Minor was found downstairs. Some of it was [76] found in the—the seeds evidently were found in a douche bag. I would hesitate to say that that would show any connection between those seeds and Mr. Minor.

I would also point to another case, Delgado versus the United States in 327 Fed 2nd 641. In that case, seven marijuana cigarettes and a small quantity of loose marijuana was found inside a dresser drawer and there were two defendants. There was a commonlaw relationship and the Court held that because they couldn't prove which one it belonged to that they couldn't show any knowing possession. It said—the Court said, "It is fundamental to our system of criminal law that guilt is individual. Here that means there must be sufficient evidence to support a finding as to each defendant that he or she had possession of the marijuana," and then it goes on, "no doubt, one of them did. Perhaps both did, but proof that does not give a rational basis for resolving the doubts necessarily

present in the situation pictured to the jury in this case is not sufficient."

Now, in that case a jury finding the defendants guilty was turned over on appeal and I would submit that that standard is not too different than the standard that you are applying for the preliminary hearing.

Now, that's so much for the adequacy of the evidence to show guilt as to Mr. Minor or Mrs. Krivda.

With respect to the search and seizure, I would just incorporate my earlier argument as to the garbage can [77] and the fact that the property there was not the property of the police, that, as testified to by Officer Gates, there was no permission obtained and, therefore, that was an illegal search.

Secondly, I would again reiterate my argument that the substance found as indicated in that yellow bag and also testified to by the expert, that that was mostly tobacco and so that there really wasn't much probable cause for the officers to conclude at that point that a felony had been committed, at least by the two defendants. There was no testimony how long the cans had been there and I would also point out that the tip came on the 1st of July and the examination of the garbage can came on the 9th of July so we are not dealing here with any fresh pursuit or hot tip that necessitated the officers moving quickly. The [sic] took their time and they certainly had time to obtain a warrant, either before looking into the garbage can or even afterwards, they had plenty of time. They looked in the garbage can around 11:00 o'clock. They made the arrest at 2:30 so they had time to go downtown and present it to a neutral magistrate or they also had time to make a chemical test to assure themselves before breaking into a private home as they did. I think that's

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very important that nine days did elapse and that there was no urgency here.

Next, I would also argue that 844 of the Penal Code [78] was not complied with because the screen door was closed and the evidence suggests that the officer just opened it and placed him under arrest at that point and I don't think that he identified himself properly or announced the purpose of his entry so that I think would conclude the points that I have to say with reference to introducing this evidence at the trial.

THE COURT: All right. Your objection to the admission of the evidence, Mr. Brown, will be overruled. People's One, Two and Three may be admitted.

People rest?

MR. MARCUS: People rest.

THE COURT: Any defense at this time?

MR. BROWN: I would like to put on one witness, Your Honor.

THE COURT: All right.

MR. BROWN: It will be very short. The Defense will call Augusta Harper. [79]

AUGUSTA HARPER

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your full name, please?

THE WITNESS: Augusta Harper.

THE CLERK: What was that?

THE WITNESS: A-u-g-u-s-t-a H-a-r-p-e-r.

THE CLERK: Thank you. Just take the stand.

DIRECT EXAMINATION

BY MR. BROWN:

Q Mr. Harper, are you presently employed?

A Yes.

Q With whom are you employed?

A The Sanitation Department of the City of Los Angeles.

Q And how long have you been employed by that department?

A About five years and four months.

Q And on July 9th, 1968, did you have occasion to collect the garbage from the area that has been referred to as 1901 Nolden Avenue?

A Yes.

Q Did anything unusual happen during the collection of that garbage?

A Yes. Two officers—one asked us permission—[80] asked us would we empty our bin before we—one of the officers, first he identified his self by showing his badge and he said—he asked us would we pick the next stop up separate in the hopper, which we call the hopper, and without packing the truck up or putting anything else in the rear and to pull down there where he was waiting.

THE COURT: Was he waiting down the hill for you?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. BROWN:

Q Now, Mr. Harper, do you remember any conversations that took place between the officers and the officers to you?

A One or two words. One of them said as they was looking through the trash and emptying the bags

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and things—he took out the cigarette butts and things and said they was—

MR. MARCUS: Your Honor, I'd object to any comments made by the officers as being hearsay declarations.

MR. BROWN: Your Honor, this goes—I am trying to show an inconsistent statement. The officer testified that he had no doubt as to what the substance was and that it was marijuana and I would like to offer the testimony of Mr. Harper that the officer stated that it was either—that the defendants were either rolling their own cigarettes [81] or that it was marijuana and that this goes to show that the officer's state of mind and what he believed at that particular time, which is inconsistent with what he testified.

THE COURT: All right. Well, we'll let it in, then.

MR. MARCUS: Your Honor, for the record, I would object to any statements by—

THE COURT: All right. Objection is overruled. What did the officer say?

THE WITNESS: Well, one of the officers—I don't know which one—made the statement that they was either rolling their own or they were smoking marijuana, and I went to the front of the truck and I came back and—

MR. MARCUS: Well, I would object to any further statements as being non-responsive.

THE COURT: All right. Anything further, Mr.—

BY MR. BROWN:

Q Did he say rolling their own cigarettes or just rolling their own?

MR. MARCUS: I would object to the question as being leading and also asking for—

THE COURT: He's already answered it, Mr. Brown.

MR. BROWN: No further questions.

THE COURT: Any cross examination? [82]

MR. MARCUS: No cross examination.

MR. BROWN: One further question on the picture. Do you think it needs any identification? Will you stipulate that that's where the garbage can was?

MR. MARCUS: I won't stipulate to it. I haven't been out there.

THE COURT: Ask him the question.

MR. BROWN: Could I have the Defendant's A?

THE COURT: It's on the stand.

BY MR. BROWN:

Q Mr. Harper, would you examine this picture? Does that look like the premises that have been referred to as 1901 Nolden Avenue?

A Yes, it does.

Q Notice where the garbage can is in the picture. Is that the position of the garbage can on the day that you collected the garbage?

A Well, it's hard—I can't remember, but I know most of the time they're a little bit back to the right, you know, back by this post, but I don't know where they was on that particular day.

MR. BROWN: May the record reflect that the witness has said that most of the time the garbage can is a little to the right-hand side of the picture, but no—

Q Was it closer to the house? [83]

MR. MARCUS: I'd object to this question, Your Honor, as both making a narrative form of statement and also being leading.

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MR. BROWN: Your Honor, I am just trying to identify whether this is the usual place where the garbage can is.

THE COURT Well, how far from where the garbage can is now was it on that particular day, if you know?

THE WITNESS: I don't remember where it was.

BY MR. BROWN:

Q But if I may refer to your previous answer, did you say that it was somewhat to the right?

MR. MARCUS: Your Honor, I'd object to that question as leading.

THE COURT: Overruled.

THE WITNESS: On that particular day, I don't remember.

BY MR. BROWN:

Q But generally, where is it located?

MR. MARCUS: Your Honor, I will object. Generally does not apply to that particular day.

THE COURT: Overruled. Where was it?

THE WITNESS: Generally a little bit more to the right. [84]

THE COURT: By more to the right, how far do you mean in feet?

THE WITNESS: Over by this post.

THE COURT: By what post?

THE WITNESS: The utility post.

THE COURT: All right. Anything further?

Mr. BROWN: Nothing further.

MR. MARCUS: One question, Your Honor.

CROSS EXAMINATION

BY MR. MARCUS:

Q Mr. Harper, you said that you have been employed in this capacity for five and a half years?

A Yes.

Q And how long have you been on this route?

A Since—about eight months.

Q Are you familiar with the occupants of that house?

A Well, I used to know one guy that came down sometime but I don't know whether they lived there or not but it wasn't him.

MR. MARCUS: I ask that be stricken as not responsive.

THE COURT: Overruled. Do you know either of these people here?

THE WITNESS: No, I don't.

THE COURT: All right. Do you know where that [85] trash can belongs, to what premises?

THE WITNESS: No. I never saw anybody come out to pick it up.

THE COURT: All right.

MR. MARCUS: No further questions.

THE COURT: Anything further, Mr. Brown?

MR. BROWN: No further questions.

THE COURT: Thank you very much, Mr. Harper. Anything further?

MR. BROWN: The Defense rests.

THE COURT: All right. Do you wish to have Defendant's A introduced in evidence?

MR. BROWN: Yes, Your Honor.

THE COURT: All right. Defendant's A may be received, also. Any further defense at this time?

MR. BROWN: No further defense.

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THE COURT: All right. Motion to dismiss will be denied.

It appearing to me that the offense in the within complaint mentioned, to wit, violation of Section 11530 of the Health and Safety Code, a felony, as to each defendant, has been committed and that there is sufficient cause to believe the within named Judith H. Krivda and Rodger T. Minor guilty thereof, I order that they be held to answer to the same.

Mrs. Krivda, I understand you are presently on [86] bail of $1,000.00, plus $250.00 penalty assessment, is that correct?

DEFENDANT KRIVDA: Um hm.

THE COURT: And Mr. Minor, I understand you are also presently on $1,000.00 bail, plus $250.00 penalty assessment, is that correct?

DEFENDANT MINOR: Yes, Your Honor.

THE COURT: All right. Bail up is to stand. Date of arraignment in the Superior Court will be the 18th day of September, 1968 at 9:00 A. M. in Department 100. [87] * * *

COMMITMENT

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. Division No. 33.

Hon. Clarence A. Stromwall, Judge Pro Tempore.

The People of the State of California, Plaintiff, vs. Judith H. Krivda and Rodger T. Minor, Defendant. No. A-234389.

IT APPEARING TO ME that the offense in the within complaint mentioned, to wit: Violation Section 11530, Health and Safety Code, has been committed and there is sufficient cause to believe the within-named JUDITH H. KRIVDA and RODGER T. MINOR, guilty thereof, I order that they be held to answer to the same and that they be admitted to bail in the sum of $1,000.00, and that they be committed to the custody of the Sheriff of Los Angeles County until they gives [sic] such bail.

DATED this 4th day of September, 1968.

/s/ Clarence A. Stromwall
Judge of the Municipal Court
Los Angeles Judicial District
County of Los Angeles
State of California
COMMITTING MAGISTRATE

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Reporter's Transcript on Appeal.

Superior Court of the State of California, for the County of Los Angeles, Department 117.

Honorable Robert Firth, Judge.

The People of the State of California, Plaintiff, vs. Judith H. Krivda and Roger T. Minor, Defendants. No. A 234 389.

September 15, 1969
October 23, 1969
October 24, 1969
December 12, 1969

Appearances: For the People: Evelle J. Younger, District Attorney, By: Quentin A. Clifton, Deputy, 600 Hall of Justice, Los Angeles, California 90012.

For the Defendants: Sam Bubrick, 205 South Broadway, Suite 600, Los Angeles, California 90012. [1]

Los Angeles, California, Friday, October 24, 1969; 11:00 A.M.

THE COURT: People versus Krivda and Minor.

MR. BUBRICK: Both of those defendants are present, your Honor.

THE COURT: All right. That was earlier submitted on the transcript. Let's see, for what purpose?

MR. CLIFTON: 1538.5.

THE COURT: Yes.

I have read the transcript.

MR. CLIFTON: Thank you. We have no additional testimony other than the fact that, I believe, Mr. Bubrick and I have agreed that we would stipulate—at least, I offer to stipulate that the same officer, Sergeant Gates, be deemed to have been called, sworn and testified that he had the truck in view at all times from the time that well was emptied until he went up and searched the well of the truck and sacks; that he actually searched the truck and the sacks from the garbage cans in this well but did not actually search the cans themselves.

MR. BUBRICK: All right, prior to being emptied in the well; is that it?

MR. CLIFTON: Yes.

MR. BUBRICK: So stipulated, your Honor.

MR. CLIFTON: Thank you.

THE COURT: There is an ambiguity a little bit here [12] in that:

> "What other contents of the envelope marked People's 2 did you find?
>
> "The portion of the items of the envelope, No. 7, was found in the garbage can by myself and my partner."

Was it found after? Before?

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MR. BUBRICK: I will stipulate that—

THE COURT: It is inconsistent with all the testimony here.

MR. BUBRICK: I will stipulate that, for the purposes of this hearing, your Honor can assume that what he meant was after he searched the contents of the trash can in the well of the truck and that he never searched the contents of the trash can before it was emptied into the well of the truck.

THE COURT: Well, did he recover People's 2 from the garbage can after it was emptied into the well?

MR. BUBRICK: Yes, I would stipulate to that.

MR. CLIFTON: And that is not precisely, I believe, what the Court had in mind. Did he find it in the can itself or in the well?

MR. BUBRICK: In the well.

MR. CLIFTON: In the well, I will so stipulate.

THE COURT: People's 2 was found in the well?

MR. BUBRICK: Yes—I assume after the trash had [13] been emptied into the well.

MR. CLIFTON: Thank you.

THE COURT: And there was no contraband recovered from the can itself by the officer?

MR. CLIFTON: No.

MR. BUBRICK: No, I don't think so.

THE COURT: All right. It is just inconsistent with all the other testimony as to what happened there for the purpose of this motion alone.

Now, it is your motion to suppress. I have read the transcript. Do you have anything additional?

MR. BUBRICK: I would like to call the defendant, Roger Minor, your Honor, on the 844 problem.

THE CLERK: Raise your right hand, please.

You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help you God.

THE WITNESS: I do.

ROGER T. MINOR,

one of the defendants herein, called on his own behalf, testified as follows:

THE CLERK: Be seated and state your name in full.

THE WITNESS: Roger T. Minor. [14]

DIRECT EXAMINATION

BY MR. BUBRICK:

Q Mr. Minor, do you recall the circumstances surrounding your arrest at 1901 Nolden Street in the City of Los Angeles on July 9th—I believe, July 9th, 1968?

Yes, sir, I do.

Q And were you in a house or outside of a house or where were you?

A I was inside the house.

Q Tell the Court exactly what happened from the time that you were in the house until the time you were arrested—rather, of your arrest, if you will, please.

A I was standing in the middle of the room. Judy said that she thought she heard someone outside and she started up the stairway. It's a two-story house. A matter of seconds later two men appeared outside the screen door, came into the room. Altogether the time seemed just about two, three, four, five seconds from the time I first saw the people until they came to the

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house. I was standing in the middle of the room. Officer Gates came in through the screen door, put my hands behind my back and said, "Okay, Ed."

I asked him then, as he was putting me down into the chair, sitting me down, "What's this all about?"

He said, "It's all about narcotics. You're [15] under arrest for narcotics."

Q Prior to the time that Officer Gates came into the house, Mr. Minor, had you heard any statement outside the house about, "You're under arrest, Ed," or, "Mr. Minor," or anything of that nature?

A I heard no one word spoken outside the house.

Q Did anybody identify themselves as a police officer before that person entered the house?

A No, sir, they did not.

Q Was Sergeant Gates by himself or accompanied by another officer?

A He was accompanied by another officer in a uniform.

Q The second officer was uniformed; is that correct?

A Yes.

Q Were you ever told you were under arrest at any time before these officers entered the house?

A No, sir.

MR. BUBRICK: I have nothing further.

CROSS EXAMINATION

BY MR. CLIFTON:

Q How were you dressed at the time?

A I had just a towel wrapped around me.

Q You had previously gone out to get some garbage [16] cans?

A I had just come back up the hill. I believe I had picked up an empty garbage can, as I recall, and brought it up the hill.

Q Which officer, if you know, went to the front door?

A Officer Gates.

Q Where were you when they approached the front door?

A In the middle of the living room.

Q What did they say, if anything?

A The first word that I heard from any officer was, "Okay, Ed." I was startled by that, my name not being Ed.

Q Where was the officer that said that when he said that?

A He was standing immediately next to me, putting my hands behind my back handcuffing me.

Q Where was Judy at that time?

A She was upstairs.

Q Were you in view from the front door if someone were on the other side of the door?

MR. BURBRICK: That calls for a conclusion, your Honor.

THE COURT: Sustained.

Q BY MR. CLIFTON: Could you see from the front [17] door from where you were standing and see outside?

A Yes, sir, I could see outside.

Q Was it dark or light in the room?

A It was dark since it was the middle of summer, very hot day.

MR. CLIFTON: I have nothing further.

MR. BUBRICK: I have nothing further, your Honor.

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THE COURT: You may step down.

MR. BUBRICK: Defense rests on the 844 issues, rests on all issues.

THE COURT: People have evidence?

MR. CLIFTON: The People rely on the transcript on that point too as well as the actual testimony. It is all 1538.5.

THE COURT: Argument—

MR. CLIFTON: I suppose Mr. Bubrick—

THE COURT: Mr. Bubrick * * * [18]

Opinion of the Supreme Court of the State of California, Crim. 15295, dated July 12, 1971, may be found in the Petition for Writ of Certiorari, Appendix A, page 1.

Order of the California Supreme Court Denying Rehearing, dated August 1, 1971, may be found in the Petition for Writ of Certiorari, Appendix B, page 17.

Opinion of the California Court of Appeal, Crim. 18140, dated November 16, 1970, may be found in the Petition for Writ of Certiorari, Appendix C, page 18.

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Supreme Court of the United States.

April 3, 1972

California v. Judith H. Krivda and Rodger T. Minor, No. 71-651, October Term, 1971.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI.

"The motion of the respondents for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted."

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Supreme Court of the United States

No. 71-651 ~~October Term, 19~~

California,

Petitioner,

v.

Judith Krivda and Roger T. Minor

Order allowing certiorari. *Filed* April 3, 1972

The petition herein for a writ of certiorari to the Supreme Court of the State of California *is granted.*

IN THE

Supreme Court of the United States

NOV 12 1971
ROBERT SEAVER, CLERK

October Term, 1971

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

EDITH KRIVDA and ROGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

RESPONSE NOT PRINTED

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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH KRIVDA and ROGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

Petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this proceeding on July 12, 1971, affirming a judgment of dismissal prior to trial, whereby the petitioner must forego prosecution of the respondents for the charged offense of possession of marijuana.

Opinions Below

The opinion of the California Supreme Court, a copy of which is set forth as Appendix A to this Petition, is reported as *People v. Krivda*, 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). A copy of the order of the California Supreme Court, denying petitioner's petition for rehearing, is set forth

as Appendix B. The prior opinion of the California Court of Appeal, Second Appellate District, Division One, a copy of which is set forth as Appendix C, is reported as *People v. Krivda*, 91 Cal. Rptr. 219 (1970).

Jurisdiction

The judgment of the California Supreme Court which is sought to be reviewed was entered on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. The present Petition for Writ of Certiorari is being filed within ninety days of the aforementioned order.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purpose of pickup by municipal trash collectors, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to conglomeration of the contraband with other trash.

2. Whether in any event application of the exclusionary rule is constitutionally compelled under the circumstances of the present case.

Constitutional Provisions Involved

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particulary describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. History of the Case

In an information filed by the District Attorney of Los Angeles County, respondents were charged with possession of marijuana in violation of section 11530 of the California Health and Safety Code. [Cl. Tr.[1] p. 90.] Respondents' motion in the Los Angeles Superior Court to set aside the information pursuant to California Penal Code section 995 was denied. [Cl. Tr. p. 92.] Respondents thereafter entered pleas of not guilty. [Cl. Tr. p. 93.]

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing [Cl. T. pp. 1-89] and on further testimony had at a hearing on that motion. [Rep. Tr.[2] pp. 1-37.] The motion was denied on October 24, 1969. [Cl. Tr. pp. 101, 103.] With the same judge presiding, the court on December 12, 1969, reopened the motion and on the same evidence and argument reversed its ruling and granted the motion to suppress evidence. On petitioner's representation that no other or additional evidence existed, and on motion of the court, the proceedings against respondents were dismissed. [Cl. Tr. p. 106.]

Petitioner appealed to the California Court of Appeal, Second Appellate District, from the judgment of dismissal and order suppressing the evidence. On November 16, 1970, Division One of that court reversed

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[1]Reference is to the Clerk's Transcript, a certified copy of which has been filed with this Court.

[2]Reference is to the Reporter's Transcript of the hearing on the motion, a certified copy of the transcript having been filed with this Court.

the judgment and order of the superior court in an opinion set forth in Appendix C, *infra,* and reported as *People v. Krivda,* 91 Cal. Rptr. 219 (1970).

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda,* 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). (*See* Appendix A, *infra.*) The court summarized its holding as follows:

> "[T]he People's appeal from the order of dismissal should be denied, since the evidence which was sought to be suppressed was obtained by means of an unlawful search and seizure and constitutes the only evidence sufficient to sustain a conviction against either defendant." *Id.,* 361 [96 Cal. Rptr. at 64, 486 P.2d at 1264] (*See* Appendix A.)[8]
>
> "[I]n the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' contents. . . . [A]t no time did defendants' trash lose its 'identity' by being mixed and combined with the 'conglomeration' of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant."
>
> *Id.,* 366-67 [96 Cal. Rptr. at 68, 486 P.2d at 1268]. (*See* Appendix A, *infra.*)

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[8]The court also held that the superior court lacked jurisdiction to entertain respondents' *renewed* motion to suppress, once its original order denying the prior motion to suppress had become final as to the superior court. *Ibid.*

On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* Appendix B, *infra.*) Petitioner's application for stay of enforcement of judgment was denied by Mr. Justice Douglas on September 7, 1971. *California v. Krivda* (O.T. 1971, No. A-259).

B. Statement of Facts

The evidence is accurately set forth in the opinion of the California Supreme Court, and the following summary of the facts is taken from that opinion.

> "The pertinent facts leading to defendants' arrest are as follows: On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that 'Roger,' 'Judy' and 'Frankie,' residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, a single family dwelling, observed two young female children in front, and ran a utility check which showed that Judy Krivda paid the utilities there. Investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. About 11 a.m. on July 19, 1968, the officers returned to the address and saw several trash barrels in front on the parkway adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden.

"The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north the officers examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds. One sack also contained six partially burned marijuana cigarettes, an envelope bearing the words 'Edward Krivda, 1901 Nolden,' a white, lined piece of paper on which was a handwritten letter with the name 'Frankie' mentioned in it dated Saturday, 13th, signed by 'Al,' and a three by five card dated Wednesday, 6-26, bearing the names 'Roger' and 'Judy.' The officers took a position of vantage and watched the premises; they observed defendant Roger Minor come out of the house at that address, pick up the trash barrels and carry them to the front porch of the house. They then approached the premises, effected entry, discovered defendants in the residence and recovered additional marijuana and paraphernalia."

People v. Krivda, 5 Cal. 3d 357, 360 [96 Cal. Rptr. 62, 63-64, 486 P.2d 1262, 1263-64] (1971).

See also Appendix A, *infra*.

C. How the Federal Questions Arose

1. The legality of the seizure of the contraband from the bin of the garbage truck was raised in the pretrial motions to suppress that evidence. [Cl. Tr. pp. 101, 103, 106.] This issue was subsequently passed upon in the state appellate courts, in petitioner's favor by the California Court of Appeal, Second Appellate District, *People v. Krivda*, 91 Cal. Rptr. 219 (1970)

(*see* Appendix C, *infra*), and, subsequently, adversely to petitioner by the California Supreme Court. *People v. Krivda*, 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). (*See* Appendix A, *infra.*) That court based its holding on the Fourth Amendment to the United States Constitution, as interpreted by this Court's decision in *Katz v. United States*, 389 U.S. 347, 353. *See People v. Krivda, supra* at 365 [96 Cal. Rptr. at 67, 486 P.2d at 1267].

2. The issue whether application of the exclusionary rule is constitutionally compelled under the circumstances of the present case was implicit in the pretrial motion to suppress the evidence in question and was specifically raised in petitioner's petition for rehearing in the California Supreme Court (at p. 2)[4] in light of the dissenting opinion of Chief Justice Burger in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411-27, which came down subsequent to submission of the present case in the California Supreme Court. Petitioner's petition for rehearing was denied by the California Supreme Court without written opinion on August 16, 1971. (*See* Appendix B, *infra.*)

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[4]A copy of that document is on file with this Court in conjunction with the prior application for stay of enforcement of judgment. *California v. Krivda* (O.T. 1971, No. A-259).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

Seizure of Contraband Abandoned in Trash Receptacles Placed on Public Property for Public Pickup Involves a Constitutional Issue of Vital Importance to Law Enforcement on Which the United States Courts of Appeals Have Rendered Conflicting Decisions; Furthermore, the California Supreme Court's Holding, Suppressing Such Evidence, Misconstrues Decisions of This Court

The availability of an important investigative method is in issue as the result of the California Supreme Court's holding that the police officers acted unconstitutionally in seizing contraband found in the bin of a garbage truck after abandonment in a trash receptable deposited on public property for pickup. Unless certiorari is granted, law enforcement officers in California and any other jurisdiction which might follow the views of the California Supreme Court will be foreclosed from engaging in the aforementioned method of investigation, a method considered essential in combatting those criminal activities which, by their very nature, involving clandestine conduct and no victim, are already exceedingly difficult to investigate.

The need for appellate review of restrictive trial court rulings granting pretrial motions to suppress evidence was noted in the report of the President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 140 (1967).

See also American Bar Association, Standards Relating to Criminal Appeals (1969).[5]

It is particularly appropriate for this Court to consider problems of this sort because only rarely is this Court given an opportunity to determine whether limitations imposed by lower courts *upon law enforcement* have improperly restricted the right of the public as a whole to the proper enforcement of its laws. Most of the cases before this Court, by the very nature of our judicial system, concern situations wherein lower courts have held that constitutional rights of defendants have not been infringed and this Court then determines whether such rights do in fact exist or in fact have been infringed.[6]

Furthermore, the California Supreme Court's decision is inconsistent with holdings of this Court. The California court's conclusion that a person has a rea-

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[5]With reference to the Presidential Commission's Report, the A.B.A. study remarked:

"The Commission reasoned that the law of search and seizure and of confessions is uncertain, that the issue of admissibility of such evidence is of great significance to both prosecution and defense, and that therefore lower court decisions restricting police conduct should be open to testing on appeal. If such restrictive decisions are not appealable, the Commission found, prosecution officials would either have to abandon the practice without an authoritative appellate ruling or have to continue the practice despite the lower court's decision in the hope of a future trial court decision sustaining the practice from which a defense appeal might produce an appellate court ruling." *Id.*, 38.

[6]Only six of the fifty search and seizure cases decided subsequent to *Mapp v. Ohio*, 367 U.S. 643, and indexed in the digest of the Supreme Court Reporter, arose in this Court as a result of a petition by the prosecution for a writ of certiorari or by way of a prosecution appeal. (The prosecution prevailed in five of the six.)

sonable expectation of privacy[7] in the trash which he deposits in a trash receptacle placed for public pickup on public property, is contrary to this Court's holdings that "There can be nothing unlawful in the Government's appropriation of . . . abandoned property." *Abel v. United States,* 362 U.S. 217, 241 (where the issue was whether the contents of a wastepaper basket in a vacated hotel room could properly be searched by the officers.) *See also Hester v. United States,* 265 U.S. 57, 58.

On the specific issue whether one's reasonable expectation of privacy extends to the contents of trash receptacles placed outside the premises for pickup, the intermediate federal courts appear to have arrived at conflicting conclusions.

In *United States v. Dzialak,* 441 F.2d 212, 215 (2d Cir. 1971), the trash deposited in such receptacles was characterized as abandoned and subject to seizure

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[7]The phrase "reasonable expectation of privacy" appeared for the first time in a majority opinion of this Court in *Terry v. Ohio,* 392 U.S. 1, 9, and was subsequently used in *Alderman v. United States,* 394 U.S. 165, 179, n. 11. The same concept has appeared, although in slightly different phraseology, in *Mancusi v. De Forte,* 392 U.S. 364, 368 ("reasonable expectation of freedom from governmental intrusion"), and in *United States v. White,* 401 U.S. 745, 752 ("what expectations of privacy are constitutionally 'justifiable'—what expectations the 4th Amendment will protect in the absence of a warrant"). However, tracing the history of this phrase discloses that the concept originated in the concurring opinion of Justice Harlan in *Katz v. United States,* 389 U.S. 347, wherein he stated as follows with respect to this concept:

> "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.' " *Id.,* 361.

by government agents. The defendant had argued in the Court of Appeals that the search was unlawful, pointing out the existence of a town ordinance making it unlawful for anyone except an authorized employee of the town to rummage in the trash.[8]

The Court of Appeals went on to state:

> "We think it abundantly clear that Dzialak abandoned the property. The town ordinance simply cannot change the fact that he 'threw [these articles] away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.' [Citation.]" *Ibid.*

However, in *Work v. United States,* 243 F.2d 660, 662-63 (D.C. Cir. 1957), a different circuit held that there was no abandonment of the trash and that its seizure was unlawful. *But compare* the dissenting opinion of then Circuit Judge Burger in the *Work* case:

> "I dissent because I do not find in this record an *unreasonable* search and seizure prohibited by the Constitution. . . .
>
> "The Fourth Amendment was designed to safeguard the individual's right of privacy in his home and in his personal effects against arbitrary intrusion by government officials. I cannot find a fundamental constitutional right to privacy in the garbage or trash pail of a rooming house where the receptacle is located out of doors in sight from the street and where there is an admitted

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[8]The California Supreme Court in *People v. Krivda, supra,* 5 Cal. 3d at 366 (n. 7) [96 Cal. Rptr. at 68, 486 P.2d at 1268], discussed local ordinances governing trash collection, and, in the text preceding the footnote, further discussed similar municipal ordinances and their legal effect.

constant invitation to the public authorities of the District to remove the contents as refuse. . . ." (Emphasis in the original; footnote omitted.)

Work v. United States, supra at 663 (Burger, J., dissenting).[9]

See also United States v. Minker, 312 F.2d 632, 634-35 (3d Cir. 1962), *cert. denied,* 372 U.S. 953.

State court decisions have also rejected the conclusion reached by the California Supreme Court in the case at bar. In *Croker v. State,* 477 P.2d 122 (Wyo. 1970), the Wyoming Supreme Court was faced with the legality of a police inspection of garbage. In that case trash collectors had entered the defendant's back yard through a gate in order to remove and empty his trash cans. Following such action by the trash collectors, the police inspected the defendant's garbage prior to its being commingled with the trash of other persons. The Wyoming Supreme Court stated:

"Even assuming under the rationale of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, and Work v. United States, 100 U.S. App.D.C. 237, 243 F.2d 660, and the hold-

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[9]This view conforms to the second requirement of the reasonable expectation of privacy" test as set forth by Justice Harlan when he first enunciated this test. As noted in footnote 7, Justice Harlan in stating his understanding of what constitutes a reasonable expectation, stated that the reasonableness of the expectation is to be determined by ascertaining whether society is prepared to recognize that expectation as reasonable. *Katz v. United States,* 389 U.S. 347, 361.) This Court appears to have accepted this test in *United States v. White,* 401 U.S. 745, wherein this Court stated that in terms of the principles of *Katz* the problem is to determine "what expectations of privacy are constitutionally 'justifiable'—what expectations the 4th Amendment will protect in the absence of a warrant." (401 U.S. 745, 752.)

ing in People v. Edwards, 71 Cal.2d 1096, 80 Cal.Rptr. 663, 458 P.2d 713, that defendant did have a reasonable expectation of privacy to the contents of his garbage cans as long as the contents were on his premises it would be most unrealistic to hold that such reasonable expectation of privacy would reach beyond the confines of defendant's premises. It is our view that when defendant put his garbage in his garbage cans for purposes of removal he impliedly consented to entry upon his premises by the garbage collectors in the regular performance of their duties and to the removal of the garbage by them to the alley, which was open to the public. At that time the officers or anyone else, if the garbage collectors did not object, were free to examine the contents of the collectors' barrel."

Croker v. State, supra at 125.

See also State v. Purvis, 249 Ore. 404 [438 P.2d 1002, 1005] (1968).

Petitioner submits that the rationale of the above-quoted cases makes it clear that persons who deposit contraband in trash receptacles and then place these receptacles on public property adjacent to the street for pickup by rubbish collectors do not exhibit any expectation of privacy with respect thereto—and certainly no *reasonable* expectation of privacy. The very nature of garbage is such that it is no longer wanted and has been discarded for whatever use may be made of it by either the trash collector, who may pick up the trash, a citizen who may pick through the trash, or the local governing agency which may use it for fill in a public

dump or perhaps, in light of ecological trends, attempt to reclaim some of the material therein.

Although the citizen who throws away his garbage may prefer that his neighbors not inspect it or that the trash man not observe it, the citizen has in fact removed any indicia of privacy from the discarded property upon placing it in a trash receptacle adjacent to a public street., Almost by definition, discarded garbage is abandoned property, outside the ambit of the Fourth Amendment's protection of reasonable expectations of privacy. *Abel v. United States, supra.* The dignity of that protection should not be contaminated by a false equation of discarded garbage, placed adjacent to the street, with the sanctity of the home.

II

Application of the Exclusionary Rule Is Not Constitutionally Compelled Under the Circumstances of the Present Case

The case against the exclusionary rule was forcefully stated and developed at length by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 411-27. That opinion chronicles the "many expressions of disenchantment with the Exclusionary Rule," *id.,* 426, and calls for consideration of "at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Id.,* 424.

No purpose would be served by reiterating here the many cited arguments and authorities supportive of a total or partial abolition of the exclusionary rule.

It is petitioner's position that the present case affords an ideal vehicle for this Court to effect a re-

examination of the exclusionary rule and either directly narrow the operation of the rule or set forth in some detail what might be constitutionally acceptable as a legislative alternative to the restrictive exclusion of evidence which this Court imposed as a requirement upon the States in *Mapp v. Ohio,* 367 U.S. 643.

If this Court rejects the grounds urged in Argument I, *infra,* in support of the granting of certiorari, this case will indeed become the classic example of where "The criminal is to go free because the constable has blundered." *People v. De Fore,* 242 N.Y. 13, 21 [150 N.E. 585, 587] (1926).

As previously noted, the California Supreme Court's determination that the police officers' inspection of the garbage truck's bin violated respondents' Fourth Amendment rights led that court to conclude that *the prosecution against respondents must be dismissed.* Immunity from prosecution for possession of marijuana was granted to the two respondents, who (as the opinion notes) were injecting respondent Krivda's children with methedrine, because of the conclusion reached by four members of the California Supreme Court. That conclusion, rejected by three members of that court and the panel of three justices of the intermediate California Court of Appeal, was that the police officers had three years earlier acted unreasonably in their on-the-spot decision that society's interest required inspection of the contents of the garbage truck bin.

It is petitioner's position that the officers acted reasonably under Fourth Amendment standards. But even if the majority of the California Supreme Court, with its hindsight and expertise in the area of constitutional law, is correct in concluding that the officers'

actions were unreasonable, should such an error on the officers' part automatically invoke the exclusionary rule? The present case provides a graphic illustration of conduct that can at most be assessed as a non-wilful technical violation in an area of constitutional law so fraught with uncertainty that even seven California Supreme Court justices were as closely divided as possible on the proper course for the officers to have taken.

Certainly there are unusual situations where a violation of Fourth Amendment rights may be so flagrant and wilful as to call for exclusion of all evidence improperly obtained thereby. But clearly this is not such a case—nor are the majority of cases involving Fourth Amendment violations, where law enforcement officers, prosecutors, and innocent members of society are unjustly punished by the monolithic judicial response of exclusion of evidence, often resulting in the release of the theoretically aggrieved suspect.

Conclusion

The Fourth Amendment, in its protection of reasonable expectations of privacy, is commonly said to be a recognition of the protected status which a civilized society accords to the home, as typified in the maxim that "a man's home is his castle." However, it would be a perversion of this maxim of constitutional law to make of a man's garbage can an inviolable sidewalk sanctuary for the concealment of refuse from his cache of narcotics.

In view of the vital nature of the federal constitutional issues presented in this petition, and the conflict among the federal circuit court decisions and state su-

preme court decisions in this area, petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California
In Bank

The People, Plaintiff and Appellant,	)	Crim. 15295
v.	)	(Sup. Ct. No.
Judith Krivda and Roger T. Minor, Defendants and Respondents.	)	A-234389)

Filed: July 12, 1971.

The question presented by this appeal is whether a householder who places contraband in trash barrels and subsequently places the barrels adjacent to the street for pickup by the rubbish collector may be deemed to have abandoned the trash at that location and to have forsaken any reasonable expectation of privacy with respect thereto.

The pertinent facts leading to defendants' arrest are as follows: On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that "Roger," "Judy" and "Frankie," residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, a single family dwelling, observed two young female children in front, and ran a utility check which showed that Judy Krivda paid the utilities there. Investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. About 11 a.m. on July 19, 1968, the officers returned to the address and saw several trash barrels in front on the park-

way adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden.

The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north the officers examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds. One sack also contained four to six partially burned marijuana cigarettes, an envelope bearing the words "Edward Krivda, 1901 Nolden," a white, lined piece of paper on which was a handwritten letter with the name "Frankie" mentioned in it dated Saturday, 13th, signed by "Al," and a three by five card dated Wednesday, 6-26, bearing the names "Roger" and "Judy." The officers took a position of vantage and watched the premises; they observed defendant Roger Minor come out of the house at that address, pick up the trash barrels and carry them to the front porch of the house. They then approached the premises, effected entry, discovered defendants in the residence and recovered additional marijuana and paraphernalia.

On September 18, 1968, defendants were charged by information with possession of marijuana (Health & Saf. Code, § 11530). Thereafter, trial was continued because of the pendency on appeal of People v. Edwards, 71 Cal.2d 1096, decided by this court on September 24, 1969. On October 24, 1969, the superior court heard and denied defendants' motion to suppress evidence (Pen. Code, § 1538.5). On December 12, when the case was called for trial setting, defendants

moved to "reopen" the ruling on their motion to suppress. The court granted the motion to reopen, took the matter under submission on the basis of the transcript and evidence previously admitted at the prior hearing, and granted the motion to suppress. Then, on its own motion, the court ordered the action dismissed (Pen. Code, § 1385). The People appeal from the order of dismissal (Pen. Code, § 1238, subd. 7).

We have concluded that the court had no jurisdiction to entertain defendants' renewed motion to suppress, once its order denying the prior motion had become final as to that court, since the sole and exclusive remedy prior to conviction to review the denial of a motion to suppress is by means of an extraordinary writ of mandate or prohibition pursuant to Penal Code section 1538.5, subdivision (i). However, we have also concluded that the People's appeal from the order of dismissal should be denied, since the evidence which was sought to be suppressed was obtained by means of an unlawful search and seizure and constitutes the only evidence sufficient to sustain a conviction against either defendant.

The People first contend that the trial court had no jurisdiction to entertain defendants' renewed motion to suppress. That contention finds support in the language of section 1538.5, subdivision (i),[1] which per-

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[1]Section 1538.5, subdivision (i), provides as follows: "If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after

(This footnote is continued on next page)

mits the defendant to make a motion to suppress (or to renew a prior motion denied at the preliminary hearing) at a special de novo hearing in superior court prior to trial, and which further provides that "After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing."

As we pointed out in People v. Superior Court (Edmonds), 4 Cal.3d 605, 610, one of the purposes underlying the enactment of section 1538.5 was to reduce the unnecessary waste of judicial time and effort involved in rehearing and redetermining at various stages in a criminal proceeding the same search and seizure questions. Accordingly, in that case we reaffirmed the principle set forth in People v. O'Brien, 71 Cal.2d 394, 403, that the superior court has no jurisdiction to entertain *at trial* a renewed motion to suppress previously denied at a special hearing in that court. By similar reasoning, we conclude that the superior court is without jurisdiction to entertain such a renewed motion prior to trial, following the expiration of the 30-day period within which to seek extraordinary relief. As stated in People v. Superior Court (Green), 10 Cal.App.3d 477, 480-481, "Had the Legislature intended to allow before trial the trial court's review, by way of rehearing, of a ruling on a pretrial motion made in

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notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing."

the trial court it would have so provided. Construction of section 1538.5 to permit such a rehearing would doubtless result in repeated and endless hearings on each of which the same search and seizure issue would be raised before successive judges until one granted the motion. This may or may not amount to forum shopping but such practice would fail to comport with justice, encourage trial delays impairing the right of both parties to a speedy trial and do violence to the original purpose of section 1538.5, Penal Code—to streamline our criminal court processes, cut down the number of times a defendant can raise the search and seizure issue prior to conviction and provide an orderly system for litigating the validity of a search and seizure. Under the statute a defendant is entitled to make only one pretrial motion to suppress evidence in the superior court and if it is denied his only remedy is, within thirty days, to seek a writ of mandate or prohibition from this court; if he is unsuccessful and the evidence sought to be suppressed is used against him resulting in conviction he may further pursue his remedy by appeal from the judgment upon which further review of the validity of the search or seizure may be had. [Citation.] He is not entitled to a second hearing on the motion prior to trial."

Defendants point out that in the instant case, their renewed motion was presented in the form of a motion to "reopen" to the same judge who had previously denied it. Defendants urge us to hold that under such circumstances the judge had jurisdiction to reconsider and correct his own prior ruling on defendants' motion to suppress. It is true that there are several cases which hold that a court has the inherent power to reconsider, and thereupon to modify, revoke or set aside, a prior

order upon determining that its order was erroneous. (See People v. Eggers, 30 Cal.2d 676, 692; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 634; Harth v. Ten Eyck, 16 Cal.2d 829, 832-834; San Francisco Lathing, Inc. v. Superior Court, 271 Cal. App.2d 78, 81; Big Bear Mun. Water Dist. v. Superior Court, 269 Cal.App.2d 919, 928; 2 Witkin, Cal. Procedure, Proceedings Without Trial, § 12, p. 1649.) It has been suggested, however, that the foregoing rule is limited in its application to mere "procedural" rulings which may be modified at any time before final judgment (see Greene v. Superior Court, 55 Cal.2d 403, 405; City of San Diego v. Superior Court, 36 Cal.2d 483, 486), and is an exception to the general rule that judicial error which occurs in the rendition of orders or judgments which are the fault of judicial discretion, as opposed to clerical error or inadvertence, may not be corrected except by statutory procedure (see In re Candelario, 3 Cal.3d 702, 705; Minardi v. Collopy, 49 Cal.2d 348, 352-353; Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 191-196 [dis. op. of Traynor, J.]).

Without attempting to reconcile these various cases,[2] or to determine whether motions to suppress may be characterized as "procedural" only,[3] it seems apparent from the language of subdivision (i) of sec-

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[2]A recent article examines some of the cases in this area and finds them largely unreconcilable. See Goodman, The Power of the Trial Judge to Change a Prior Ruling on a Motion, 45 State Bar J. (1970) 483.

[3]A proceeding under section 1538.5 to suppress evidence is one in which a full hearing is held on the issues before the superior court sitting as finder of fact. (People v. West, 3 Cal.3d 595, 602.) Accordingly, an order made following the hearing is arguably more in the nature of a judgment after trial than an ordinary ruling on a procedural matter during the course of trial.

tion 1538.5 that the Legislature, in order to reduce the time spent in relitigating search and seizure questions, intended that the court's order denying a motion to suppress should, in the absence of a timely request for extraordinary appellate relief, become final 30 days thereafter and not subject to further review until an appeal is taken following trial. Otherwise considerable judicial time could be expended in rehearing and redetermining matters which had already been fully litigated, thereby possibly delaying the trial of the case.

However, until the 30-day period has expired and the order has become final, the court should have the inherent power, prior to trial, to reconsider and "reopen" its prior ruling.[4] The 30-day limitation on reconsideration should minimize the likelihood of substantial delay of trial, and should enable the judge to review his ruling while the facts underlying the motion and the law applicable thereto are still fresh in mind. Of course, successive applications based upon the same factual showing should be discouraged, and ordinarily the court should refuse to consider a renewed motion supported by substantially the same facts as the one denied, but until its order has become final the court should have jurisdiction to reconsider it. (See Imperial Beverage Co. v. Superior Court, *supra*, 24 Cal.2d 627, 634; Big Bear Mun. Water Dist. v. Superior Court, *supra*, 269 Cal.App.2d 919, 928; Josephson v. Superior Court, 219 Cal.App.2d 354, 359.)

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[4]See People v. Leighter, 15 Cal.App.3d 389, 393-395, upholding the trial court's jurisdiction to reconsider its ruling on a prior motion to suppress made within the 30-day period and prior to commencement of trial.

In the instant case, defendants failed to request reconsideration of the court's order denying their motion to suppress until after the 30-day period under subdivision (i) had expired. Accordingly, the trial court should not have entertained their renewed motion, and its order granting the same was beyond its jurisdiction and void. Nevertheless, both parties have briefed and argued the merits of defendants' motion, and we are prepared to rule upon it at this time rather than to reverse and remand the case for trial, for we have concluded that defendants' original motion to suppress should have been granted. Since the People have conceded that there is no additional evidence against defendants, it is apparent that the People's appeal from the order of dismissal must be denied.[5]

The People contend that the search of defendants' trash barrels and the seizure of their contents were reasonable. They point out that the barrels were located near the sidewalk on public property, that neither the officers nor trash collectors committed a trespass in seizing and examining the contents of the barrels, and that under the facts in this case defendants may be deemed to have abandoned their trash and to have forsaken any reasonable expectation of privacy with respect thereto.

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[5]In People v. Superior Court (Edmonds), *supra*, 4 Cal.3d 605, 611, involving similar procedural issues, we decided not to reach the merits of the defendant's motion to suppress. In that case, the void order granting the renewed motion occurred after trial, but no dismissal was entered. Therefore, our refusal to consider the merits would not require the parties to undergo an unnecessary trial, as in this case. Further, unlike this case, we had no jurisdiction to reach the merits, since the matter reached us on petition for mandate, rather than on appeal. As we pointed out in *Edmonds*, mandate is proper only to review *jurisdiction*, not ordinary judicial error. (See also People v. Superior Court (Howard), 69 Cal.2d 491, 499-501.)

A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a "constitutionally protected area," (see, e.g., cases cited in People v. Edwards, *supra,* 71 Cal.2d 1096). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see Katz v. United States, 389 U.S. 347, 350-352), and we have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion (People v. Bradley, 1 Cal.3d 80, 84; People v. Edwards, *supra,* 71 Cal.2d 1096, 1104-1105).

The People note that *Edwards* and *Bradley* were decided subsequent to the events which led to defendants' arrest herein and urge that the principles announced in those decisions should be given only prospective effect. However, the "reasonable expectation of privacy" test adopted in *Edwards* and reaffirmed in *Bradley* represented no new constitutional principle which might call into play the various criteria (see, e.g., *Edwards, supra,* at pp. 1107-1108) used for resolving retroactivity problems. Instead, that test was put forth at least as early as Katz v. United States, *supra,* 389 U.S. 347, 353, wherein the Court held that "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment," and that in the absence of prior judicial authorization the search and seizure were unreasonable. (See also People v. Edwards, *supra,* 71 Cal.2d 1096, 1103-1104;

People v. Terry, 70 Cal.2d 410, 427.) We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in Katz v. United States, *supra*, may properly be applied to test the validity of the search and seizure at issue herein.

As the People point out, the facts in the instant case differ from those in *Edwards* in certain respects. In *Edwards*, the officers searched trash cans which were placed in the "open back yard area" behind defendants' residence, a few feet away from the back door. Consequently, the officers were required to trespass upon defendants' property in order to make the search. Although the foregoing facts were relevant to our determination that defendants had a reasonable expectation of privacy, they were not necessarily dispositive of that determination. The fact that a search may or may not involve a trespass or other invasion of defendant's property interests is not conclusive, for "The prohibition in the [Fourth] amendment is against unreasonable searches and seizures, not trespasses." (People v. Terry, *supra*, 70 Cal.2d 410, 427.) As stated in Katz v. United States, *supra*, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citation.] But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected [Citations]" (Italics added; 347 U.S. at pp. 351-352.)

The question remains whether defendants herein had a reasonable expectation of privacy[4] with respect to the contents of their trash barrels. The People urge that the placement of the barrels near the sidewalk for collection constituted an abandonment of their con-

tents. Indeed, had defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby foresaken any reasonable expectation of privacy with respect thereto.[6]

The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860, ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (*Id.*, § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection.[7]

Aside from municipal ordinances, there may exist an additional element of expected privacy whenever one

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[6]Note that if defendants had in fact abandoned the contraband found in their trash barrels, the People might be unable to establish the dominion and control necessary to constitute the offense of possession with respect thereto. However, in the instant case, that contraband led to the discovery of additional marijuana and paraphernalia in defendants' apartment which could properly form the basis for a conviction.

[7]Note also that ordinances governing trash collections may require the householder to place his trash barrels at the curb along the street in front of his house, at least in the absence of other arrangements with the collectors. (*Id.*, § 1706.) Thus, defendants' placement of the barrels near the sidewalk was not necessarily indicative of any intent other than to comply with such a requirement. We would be reluctant to distinguish *Edwards* solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection.

consigns his property to the trash can, to be dumped, destroyed and forgotten. As stated in *Edwards,* "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, *at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere.* Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (Italics added; People v. Edwards, *supra,* 71 Cal.2d 1096, 1104.)

Similarly, in the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' contents. The fact that the officers did not examine the contents until the trash had been placed into the well of the refuse truck does not distinguish *Edwards,* for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant.

Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen

that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. However, as stated in People v. McGrew, 1 Cal.3d 404, 412, "The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room."

It is also clear, as in *Edwards,* that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See People v. Edwards, *supra,* 71 Cal.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant.

Since the marijuana found in defendants' trash barrels was the result of an illegal search and seizure, that evidence should have been ordered suppressed pursuant to Penal Code section 1538.5. The People apparently concede that the additional contraband and paraphernalia discovered in defendants' residence was "tainted fruit of the poisonous tree" and likewise should have been ordered excluded as the product of the prior illegal search. (See People v. Edwards, *supra,* 71 Cal. 2d 1096, 1105, and cases cited.) The People also concede that they have no further evidence against defendants. Accordingly, the action was properly dismissed under Penal Code section 1385.

The judgment of dismissal is affirmed.

Burke, *J.*

We Concur:

Peters, *J.*
Tobriner, *J.*
Mosk, *J.*

People v. Krivda, Crim. 15295.

CONCURRING AND DISSENTING OPINION BY WRIGHT, C.J.

I join in the opinion of the majority that a motion to suppress illegally seized evidence, made pursuant to Penal Code section 1538.5, may not be renewed prior to trial, following expiration of the 30-day period with which to seek extraordinary relief. I do not agree, however, that the area protected by the Fourth Amendment proscription of unreasonable searches and seizures encompasses parkways immediately adjacent to public thoroughfares or pedestrian walkways or that the police action enlisting the assistance of the authorized trash collectors in separately picking up trash placed at the curb for pickup transmuted the collection into an unreasonable seizure. Moreover, in my view, a householder has neither a reasonable expectation of privacy as to his curbside trash, nor a right to expect that his trash will be commingled with that of others before it is subject to examination, governmental or otherwise. Whatever his hope may be as to the ultimate disposition of his trash, it does not, in my view, rise to a "reasonable expectation of privacy."[1]

I do not question the proposition enunciated in People v. Edwards, supra, 71 Cal.2d 1096, that trash cans immediately adjacent to a home, in a place to which the general public is not invited, are within a "constitutionally protected area" (Hoffa v. United States (1966) 385 U.S. 293, 301) as to which the

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[1]The existence of an ordinance prohibiting tampering with trash containers by unauthorized persons in no way affects this conclusion. Ordinances such as this are typically enacted to protect the exclusive right of a city or its authorized agent to collect the trash. (See 7 McQuillan, Municipal Corporations, p. 96, § 24.251, and cases cited therein.)

owner may reasonably expect privacy from governmental intrusion. That expectation, however, is inextricably bound up in the physical location of the trash cans. I cannot accept the proposition that either *Edwards* or the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor do I find any constitutional compulsion for the newly developed doctrine of "commingled trash."

The majority purport to find support for their conclusion that the police invaded defendants' reasonable expectation of privacy as to their trash container in Katz v. United States, supra, 389 U.S. 347, where the court held that electronic eavesdropping on a telephonic conversation violated the defendant's privacy on which he justifiably relied. Since *Katz*, however, the court has further refined the constitutionally justifiable expectations which are protected by the Fourth Amendment. In United States v. White (1971) .... U.S. .... [39 U.S.L.Week 4387], the court emphasized the continued viability of Hoffa v. United States, supra, 385 U.S. 293, and prior cases approving various means by which governmental agents or informers, using electronic equipment, record or transmit their conversations with wrongdoers who believe the conversation will remain private. If *White* and *Katz* have any applicability in areas other than electronic eavesdropping, it is in their holdings that an actual expectation of privacy based on a belief that a confederate or one believed to be a confederate will not reveal a defendant's secrets, is not a constitutionally justified expectation of privacy protected by the Fourth Amendment. In *White* the court explained: "Inescapably, one contemplating illegal activities must realize and risk that

his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubts he has, the risk is his." (39 U.S.L.Week at 4389.) Surely the defendant who discards his trash and places it at the curb to be picked up must also assume the risk that the collector of the rubbish may be an agent of the police or may permit the police to examine the unconglomerated trash once it is picked up. A "constitutionally justifiable expectation of privacy" need not extend to the well of a trash truck.

We need not adopt the position of the Second Circuit that trash placed at curbside for pickup may be characterized as "abandoned" (U.S. v. Dzialak (1971) .... F.2d .... [9 Crim. L. 2046]) since, whether intended to be abandoned solely to the authorized collector or not, it is neither in a constitutionally protected area nor the subject of a constitutionally justifiable expectation of privacy.

I would reverse the judgment.

Wright, *C. J.*

We concur:

McComb, *J.*

Sullivan, *J.*

APPENDIX B

Order Denying Rehearing

In the Supreme Court of the State of California, in Bank.

People v. Krivda et al. Crim. No. 15295.

Order Due September 10, 1971.

Filed August 1, 1971.

Appellant's petition for rehearing and application for stay of remittitur denied.

Wright, C. J., McComb, J., and Sullivan, J., are of the opinion that the petition should be granted.

Wright
Chief Justice

APPENDIX C

Opinion of the Court of Appeal

In the Court of Appeal of the State of California
Second Appellate District
Division One

The People of the State of California, Plaintiff and Appellant,	)	Criminal No. 18140
vs.	)	S.C. #
Judith Krivda and Roger T. Minor, Defendants and Respondents.	)	A-234389

APPEAL from an order of the Superior Court of Los Angeles County. Robert Firth, Judge. Reversed.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, Evelle J. Younger, District Attorney, Harry Wood and Daniel L. Lieberman, Deputy District Attorneys, for Appellant.

Sam Bubrick for Respondents.

On September 8, 1968, defendants were charged with violation of section 11530, Health and Safety Code. Thereafter trial of the cause was continued because of the pendency on appeal of *People v. Edwards*, 71 Cal.2d 1096, decided September 24, 1969. On October 24, 1969, defendants' motion under section 1538.5, Penal Code, was argued and denied. On December 12, 1969, the cause was called for trial setting at which time defendants moved "to reopen" their motion under section 1538.5 Penal Code. The trial judge granted both motions and dismissed the case under section 1238, subdivision 8, Penal Code. The People appeal from the order.

On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that

"Roger" and "Judy" and a Lesbian named "Frankie," residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, observed two young female children in front and ran a utility check which showed that Judy Krivda paid the utilities there; investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. Around 11 a.m. on July 9, 1968, the officers returned to the address and saw several trash barrels in front on the parkway adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden. The residence there is a single family dwelling and the trash barrels were directly in front of 1901 Nolden in the parkway in front of the house adjacent to the sidewalk. The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north they examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds in one of which were also four to six partially burned marijuana cigarettes and an envelope bearing the name Edward Krivda, 1901 Nolden, a white lined piece of paper on which was a handwritten letter with the name "Frankie" mentioned in it dated Saturday, 13th, signed by Al, and a three by five card dated Wednesday, 6-26, bearing the names of Roger and Judy. The officers took a position of vantage and watched the premises; they observed Roger Minor come out of the

address, pick up the trash barrels and carry them to the front porch of the house; they then approached the premises, effected entry, discovered defendants in the residence and recovered contraband and paraphernalia.

There is merit to appellant's first point that the superior court should not have reheard the 1538.5 motion after denying the same in October 1969. Once a trial court has entertained a motion under section 1538.5, Penal Code, before trial and denied the same, defendants' only remedy is to seek a writ of mandate or prohibition from the appellate court (§ 1538.5(i), Pen. Code) and, if unsuccessful therein, after conviction, a review on appeal from the judgment. (*Thompson v. Superior Court,* 262 Cal.App.2d 98, 106-107.) Prior to trial the court does not have jurisdiction to hear a second motion under section 1538.5, Penal Code, or rehear the first and thereby permit relitigation of the issue of search and seizure. (§ 1538.5, Pen. Code; *People v. O'Brien,* 71 Cal.2d 394, 402-403; *People v. Superior Court,* 10 Cal.App.3d 477, 480.) However, inasmuch as the matter is now before us and in the interest of economy of court time, we proceed to the merits.

At the outset it should be noted that the events herein took place in July 1968, and *People v. Edwards,* 71 Cal.2d 1096, upon which the trial court placed reliance, was decided September 24, 1969. In the light of the discussion in *People v. Edwards,* 71 Cal.2d 1096, relative to criteria guiding resolution of the question of retroactivity (pp. 1107-1109) and the holding therein that the rule of *Chimel v. California,* 395 U.S. 752 [23 L.Ed.2d 685, 89 S.Ct. 2034] be given prospective application, we conclude that the criteria mentioned in support thereof also strongly support pro-

spectivity for *People v. Edwards,* 71 Cal.2d 1096. In any event, for other reasons hereinafter discussed we conclude that *People v. Edwards,* 71 Cal.2d 1096, does not support the order herein.

Relying on the following in *People v. Bradley,* 1 Cal.3d 80, at page 84, the People argue that the doctrine of *People v. Edwards,* 71 Cal.2d 1096, regarding a defendant's reasonable expectancy of privacy is not the only test applicable to claims of unreasonable search and seizure: "A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a 'constitutionally protected area,' (See, e.g., cases cited in *People v. Edwards,* 71 Cal.2d 1096 [80 Cal.Rptr. 633, 458 P.2d 713]). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see *Katz v. United States,* 389 U.S. 347, 350-352 [19 L.Ed.2d 576, 581-582, 88 S.Ct. 507]), and we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion (*People v. Edwards,* 71 Cal.2d 1096 [80 Cal.Rptr. 633, 458 P.2d 713], and cases cited therein)." (*People v. Bradley,* 1 Cal.3d 80, 84.)

There really is no issue before us concerning whether the special protection accorded by the Fourth Amendment to the people in their "persons, homes, papers, and effects" is extended to the location of the trash barrels for the record shows that while the barrels were sitting in a public place—a parkway adjacent to the sidewalk—and they were observed without committing trespass, the officers at no time touched, inspected or searched the barrels; the examination of the contents

of these barrels took place a block away from the premises and then only after the trash collectors had emptied them into the well of their truck. It is true that the trash collectors were under orders of the police to empty the well of their truck and were their agents in doing so but it cannot be denied that they picked up the barrels from the front of defendants' residence and emptied their contents into the truck and drove away all in the ordinary course of their duties as trash collectors and this they would have done had not the officers intervened. In *People v. Edwards,* 71 Cal.2d 1096, 1104, the trash can was searched, was within a few feet of the back door to defendants' home and required trespass for its inspection.

As to abandonment, when property has been abandoned by defendant a search of the same does not constitute an unreasonable search, and appropriation thereof an unreasonable seizure. (*Abel v. United States,* 362 U.S. 217, 241 [4 L.Ed.2d 668, 80 S.Ct. 683; *Hester v. United States,* 265 U.S. 57, 58 [68 L.Ed. 898, 44 S.Ct. 445]; *People v. Long,* 6 Cal.App.3d 741, 748-749.) In *People v. Edwards,* 71 Cal.2d 1096, placing marijuana in a trash can "so situated and used"—two or three feet from the back door of defendants' home and an adjunct to the domestic economy (p. 1104)—did not constitute an abandonment except as to trashmen. While abandonment appears to have been a consideration of the court in *Edwards* in determining whether defendants exhibited a reasonable expectation of privacy, the foundational facts differ somewhat from those here involved. In *Edwards* the trash can, near defendants' back door, was used by them as a secret place of safe keeping "enough [marijuana] to roll a couple of cigarettes or more" (p.

1099). It was obvious that defendants in relegating the contraband to the trash can had no intention of abandoning it as trash but of hiding it for future use. Here the marijuana debris—leaves, seeds and partially smoked cigarettes—not of useable quantity, in the paper sacks found among defendants' trash, obviously was not contraband defendants were stashing away for future use but throwing away. That the debris was not placed in the trash can for safe keeping but for discard is a reasonable inference from the fact that the trash barrels were moved by defendants from their premises to a public place for regular pickup by trash collectors. Thus, leaving the barrels and their contents in a public place for removal by trash collectors to their truck, and discarding, among other trash, the marijuana debris in a paper sack that among other things contained papers bearing personal reference to defendants and their address fail to convince us that defendants exhibited an expectation of privacy and if they did that such expectation was reasonable under the circumstances of the case. Certainly they knew that when the collectors came the trash would be dumped into the truck; also reasonably they should have known that even when the trash was commingled if someone saw the contents of the one paper sack, the ownership of that particular piece of trash could be identified by the papers found therein. Under the circumstances of this case we do not think that the well of a trash truck on a public street a block away from defendants' residence constitutes a protected area or that the marijuana debris found therein was not abandoned by defendants; nor does it appear to us that when the trash found its way into the well of the truck any expectation of privacy in regard thereto by defendants is reasonable.

We are confronted with the following in *People v. Edwards,* 71 Cal.2d 1096, appearing after the court's holding: "We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (P. 1104.) Here by the time defendants' trash came to rest in the well of the truck it was outside the realm of curious examination by prying eyes of neighbors or others for it was then in the exclusive possession of the trash collectors. Is the householder also entitled to protection from a routine examination by police after the trash becomes the property of the refuse collector? The honest resident neither wants it nor needs it. While it might well be said that the trash collectors in this case were acting as agents of the police in clearing the well of the truck and dumping defendants' trash into the *empty* well so that it could be more easily identified, they surely were not acting as police agents in picking up defendants' trash in the first instance. As far as defendants knew and ever contemplated, and it is a fact, under ordinary circumstances and in the ordinary course of events without intervention of the police, the trash, as it was, would have been collected and dumped into the well, the only difference, it would have been emptied on top of other trash; as long as the marijuana debris and the identification papers remained together in the sack, even though commingled with other trash, they would not lose their identity and meaning. In any

event, the trash when and where examined by the officers was beyond the "rumor and gossip" stage from which *Edwards* sought to protect the householder.

For any one of the foregoing reasons, the order is reversed.

Lillie, *Acting P. J.*

We concur:

Thompson, *J.*

Gustafson, *J.*

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FILED
JUN 30 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA AND RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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IN THE

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OCTOBER TERM, 1972.

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Attorney General of the State of California, counsel for the Petitioner, and by Mr. Roger S. Hanson, Esq., counsel for the Respondents. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the state of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represent over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activity affect-

ing police work, it coordinates the activities of Police Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of both *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement.

With regard to the issue of the legality of the search of Respondent's trash, *amici* wish to associate themselves with, and express complete support for, the position taken by the Petitioner, the State of California, namely: that the search was proper and that the rule of *Katz* v. *United States*, 389 U. S. 347 (1967), should not be extended to create a newly-discovered "expectation of privacy" in one's abandoned trash. We will not, however reiterate the arguments made by the Petitioner on this issue.

With regard to the second issue of this case: assuming that the search of Respondent's trash was, in fact, a Fourth Amendment violation, whether the application of the Exclusionary Rule is constitutionally mandated. *Amici*, for obvious reasons, consider this issue to be one of overriding importance both to law enforcement officials nationwide and to citizens concerned with the fair and effective enforcement of the criminal law. Again, we will not reiterate the comprehensive arguments on this issue made by Petitioner and other *amici* in support of Petitioner; rather, we will present additional arguments for our contention that a narrowing of the scope of application of the Exclusionary Rule to those violations which are willful, flagrant, and substantial would be beneficial to law enforcement and to society as a whole.

SUMMARY OF ARGUMENT.

Amici in this brief support the position taken by Petitioner, the State of California. We have collected herein cases and articles representative of the growing number of critics of the absolute application of the Exclusionary Rule. We submit that the Exclusionary Rule has failed the test of time. Its continued absolute application has weakened our criminal justice system by turning obviously guilty criminals free to commit crime again. This result has produced a deleterious impact upon the courts, upon law enforcement, and most importantly upon a society already overburdened with a rising crime rate.

It is our contention that America's law enforcement officers have demonstrated their professionalism by their dedication to lawful and proper conduct. We support this belief by presenting this Court with an empirical study indicating that during the twenty-seven month period January, 1970 through March, 1972, appellate courts nationwide have found police conduct in cases of warrantless search and seizure to have been lawful and proper in six out of every seven cases. With this record this country's police do not need to be policed by the absolute sanctions of the Exclusionary Rule.

Finally, we ask that the scope of the Exclusionary Rule be narrowed to encompass only willful, flagrant, and substantial violations. This Court will find, we submit, that the instant case, on its facts, represents a non-willful, insubstantial violation of the Exclusionary Rule and thereby provides an excellent vehicle for the narrowing of the scope of this harmful, and ineffective, rule.

ARGUMENT.

I.

THE DELETERIOUS EFFECTS OF THE EXCLUSIONARY RULE UPON LAW ENFORCEMENT, TOGETHER WITH THE GROWING NUMBER OF CRITICS OF THE ABSOLUTE APPLICATION OF THE EXCLUSIONARY RULE, SUGGEST THAT A RE-EXAMINATION OF THE SCOPE OF THE RULE BY THIS COURT MAY BE IN ORDER.

As is well known, the Exclusionary Rule requires the automatic suppression of reliable and probative tangible evidence obtained by law enforcement officers if a court subsequently determines that the search or seizure was unreasonable. From its inception in 1914[1] the Rule evolved through the years until finally in 1961 this Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), imposed the Exclusionary Rule upon the states for two reasons: (1) to deter unlawful police conduct and (a) to prevent the courts from participating in unlawful searches and seizures.

The United States Supreme Court believed in 1961 that judicial integrity required the results announced in the *Mapp* decision. The United States Supreme Court of 1972 now has the opportunity, with the benefit of hindsight, to re-examine the Exclusionary Rule and the results produced by its application, nationwide, during the past eleven years.

Criticism of the Rule, from experts in our criminal justice system, has steadily increased in recent years. The critics cannot agree with a rule which forces the finder of fact to wear blinders in the search for the truth. Chief Justice

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1. *Weeks v. United States*, 232 U. S. 383 (1914) held that evidence which had been illegally seized by federal officers could not be used in federal courts.

Weintraub of the New Jersey Supreme Court succinctly summed up this anomaly when he said:

> Truth and justice are inseparable. A deliberately false judgment debases the judicial process, and no less so because the false judgment is an acquittal. On a motion to suppress we deal with evidence of guilt, and the purpose of the litigant is to conceal that evidence to the end that he will escape conviction notwithstanding his guilt. Hypothetically there could be some case in which the evidence sought to be suppressed would falsely suggest guilt, but a judge would be short in realism if he did not understand that the evidence he is asked to suppress is evidence of guilt and that the judgment of not guilty, which will ensue will likely be false. To justify so serious an insult to the judicial process some compensating gain should be incontestable. *State* v. *Bisacci*, 279 A. 2d 675, 676 (N. J. 1971).

With reference to Chief Justice Weintraub's final sentence, we submit that the absolute application of today's Exclusionary Rule should be re-examined in order to determine if it is, in fact, justified. The primary "compensating gain" envisioned by the U. S. Supreme Court was the deterrence of unlawful police conduct;[2] yet, we speculate that not one brief will be submitted to this Court citing statistics contrary to the conclusion that illegal police conduct has not been deterred by the Exclusionary Rule. On the other hand, one detailed study supports the aforementioned conclusion. An examination of the Exclusionary Rule was made by Dallin H. Oaks, then a professor of law at the University of Chicago.[3] After scrutinizing all the

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2. In *Linkletter* v. *Walker*, 381 U. S. 618, 637 (1965) this Court said "In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendent."

3. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Professor Oaks is now the Provost of Brigham Young University.

available data, he concluded that the data did not provide any "empirical substantiation or refutation of the deterrent affect of the Exclusionary Rule."[4] His own judgment is that the Exclusionary Rule is "a failure" as a deterrent.[5]

Chief Justice Burger has on several occasions criticized the argument that the Exclusionary Rule deters unlawful police conduct:

> Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally take notice and be deterred. As I see it, a fair conclusion is that the record does not support a claim that police conduct has been substantially affected by the suppression of the prosecution's evidence.[6]

Again in 1971 the Chief Justice commented that the hope of guiding police conduct "by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream" and that history has demonstrated that the Exclusionary Rule is "both conceptionally sterile and practically ineffective in accomplishing its stated objective."[7]

Also included among the critics of the Exclusionary Rule are many of this country's prosecutors. Carole S. Vance, District Attorney of Houston, Texas, and then President of the National District Attorney's Association, believes that the Exclusionary Rule is "perhaps the most unjust, outdated and over-rated legal doctrine in the U. S. today,"[8]

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4. *Id.* at 709.

5. *Id.* at 755.

6. Burger, *Who Will Watch the Watchman*, 14 AM. U. L. REV. 1, 11 (1964).

7. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 415 (1971) (dissenting opinion).

8. Vance, *Why The Exclusionary Rule Should be Modified*, 7 THE PROSECUTOR 399 (1971).

and that it "regards the overzealous officer of the law as a greater danger to the community than the unpunished murderer or narcotics pusher."[9]

The National Association of Attorneys General, concerned about the effects of the Exclusionary Rule, passed a resolution on December 15, 1971 which, among other things, declared that "the Exclusionary Rule provides an inflexible remedy for violations of an accused's rights, without regard to the nature, circumstances or substantiality of the claimed violation or of the rights involved...."

State court judges can be added to the list of critics. Directing his concurring opinion to the backlog created by the Exclusionary Rule, Justice George Brown of the California Court of Appeal stated:

> Many authorities have concluded that the operation of the rule in practice has done no more than bear out the prediction of Mr. Justice Spence in the Cahan case to the effect that the rule would lead to interminable delays, excessive expense, and great uncertainty. I have no doubt that it has led to a glut of cases in the courts caused by a multiplicity of challenges to the methods by which evidence was obtained at every stage of most criminal proceedings. While most of these challenges are unsuccessful, I am convinced that the amount of court time consumed in the consideration and disposition of such contentions is so large as to be one of the principal causes of our current case backlog and our overworked courts. *People* v. *Superior Court (Hawkins)*, 18 Cal. App. 3d 640, 645 (1971).[10]

The criticism of the absolute effects of the Exclusionary Rule is not restricted to this country. Both Canada and

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9. *Id.* at 401.

10. The case was subsequently vacated by the California Supreme Court *People* v. *Superior Court* (*Hawkins*), 6 Cal. 3d 757 (1972).

England have rejected the Exclusionary Rule.[11] A leading Canadian case is *The Queen* v. *Wray*, 11 D. L. R. 3d 673 (1970). At page 674 the Canadian Supreme Court stated:

> The admission of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the admission of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly. The trial Judge's discretion to exclude evidence which is admissible is limited to those cases where he has a duty to ensure that the minds of the jury will not be prejudiced by evidence which has very little probative value and which also has a great prejudicial effect. Even if the evidence has been obtained unfairly in the opinion of the trial Judge it is not his duty to exclude it if its probative value is unimpeachable.

Brevity requires that we cite only a representative selection of the authorities calling for a total or partial abolition of the Exclusionary Rule. An additional list of authors expressing their disenchantment with the anomalies produced by this Rule can be found in Chief Justice Burger's appendix to his dissenting opinion in *Bivens, supra*, at 426, 427.

As *amici*, we would fall short of our purpose in filing this brief if we did not attempt to espouse the views of he law-abiding citizen. We can, in this respect, base our comments upon our continuous contact with citizens' groups around the country. The complaint heard most often is that too many factually guilty defendants are being released by the

11. *See*, Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L. S & P. S. 271, 272 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L. C. & P. S. 272 (1961); Groom, *The Admissibility of Evidence Illegally Obtained*, 13 CHITTY'S L. J. 54 (1964).

courts. The continued refusal of the courts to accept reliable evidence indicative of the guilt of an accused is dangerously threatening a further lack of respect for and confidence in our system of criminal justice. To the layman the release of a guilty defendant as a result of illegally seized evidence is just another example of an acquittal on a "technicality."

We believe that our society has the right to express its disaffection with the effects of the Exclusionary Rule since any member of that society is potentially the next victim of the unpunished guilty criminal. Attached as an Appendix to this brief are summaries of sixteen sample cases in which the Exclusionary Rule has, in recent years, been applied. Even a cursory reading of these cases will engender a better understanding of society's growing criticism of our courts. These cases demonstrate instances in which convictions were reversed or highly probative evidence suppressed in cases involving on the one hand serious, reprehensible crimes committed by the offender and on the other hand relatively insubstantial "violations" by police officers. A rule which allows criminals of this sort to be freed or to have their convictions reversed can be justified only by clear and convincing evidence that its benefit to society outweighs this obvious cost. We submit that any evidence of the benefits of the Exclusionary Rule fails to meet this test.

Our position in this case has been succinctly stated by a former Justice of the Supreme Court of Victoria, Australia. An address delivered by Honorable Sir Reginald Sholl to the Philadelphia Bar Association on March 7, 1966 was reported in the *Congressional Record*, Senate, 92nd Cong. 2d Sess., January 26, 1972 at § 509. At § 511 this distinguished Australian lawyer stated:

> In your enthusiasm for liberalism at all costs, you are, perceptibly more than we are in Australia, throwing

> the baby out with the bath water. It is no good making individual liberty so cast-iron, by constitutional guarantees, that one's neighbour can rob one, or rape one's daughter, with a better chance of escaping justice than in other civilized countries. How stands life, liberty, and the pursuit of happiness, in that situation? It is indeed an empty freedom, a vain individual liberty, which is accompanied by a significantly increased risk to oneself or one's family of being the victim of crime. What is the real value of greater individual liberty, so-called, if it is obtained at the price of making crime harder to detect and punish, and therefore safer to commit? What is the real value to a decent law abiding citizen of being in less danger of possible abuse of power by the police, but in greater danger of fraud, theft, violence or death from criminals large and small, organized or unorganized?

The deleterious effects of the Exclusionary Rule upon society and upon law enforcement appear, to us, to be patent. We turn now to more specific comments upon police practices and the application of the Exclusionary Rule.

II.

A STUDY OF POLICE SEARCH AND SEIZURE PROCEDURES NATIONWIDE INDICATES THAT THE ABSOLUTE SANCTIONS OF THE EXCLUSIONARY RULE MAY NO LONGER BE NECESSARY TO "POLICE THE POLICE".

Chief Justice Burger, dissenting in *Bivens*, pointed out that the Exclusionary Rule is premised on the theory that the ". . . suppression of evidence . . . was imperative to deter law enforcement authorities from using improper methods to obtain evidence." 403 U. S. at 413. This theory of deterrence is, in effect, a product of the belief that the courts of this country must "police the police," via the Exclusionary Rule, to prevent them from engaging in improper conduct in the area of search and seizure. This

Court in the instant case is being asked to consider a narrowing of the "police the police" concept, therefore it becomes vital to consider modern police behavior in the search and seizure area with a view towards answering the question of whether the vast majority of today's law enforcement officers have become sufficiently professional in their search and seizure conduct that the absolute sanctions of the Exclusionary Rule are no longer necessary to "police" them.

We believe, and we will present evidence in this section, that the greatest majority of today's law enforcement officers do, in fact, desire to observe and engage in proper search and seizure procedures and that, with few exceptions, their attempts to conduct themselves with propriety in this difficult area have met with success. A consideration of this aspect of the question is, we submit, highly significant to any analysis of whether the scope of the Exclusionary Rule should be narrowed.

With regard to the desire of the police to conform their behavior to the law in search and seizure cases, Mr. Justice Tom Clark, dissenting in *Chapman* v. *United States*, 365 U. S. 610 (1961) and calling for more clear-cut rules to guide the police in search and seizure cases, summed up what we believe to be the attitude of the majority of our nation's policemen:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with a problem of search and seizure. *He is anxious to obey the rules that circumscribe his conduct in this field.* 365 U. S. at 622 (emphasis added).

We agree with this characterization of the attitude of the modern law enforcement officer but, concededly, mere *desire* to obey the rules in and of itself would not be sufficient. A second and more important element—the degree of *success* with which this desire is translated into proper

searches and seizures must be considered. Such a consideration, in order to demonstrate police professionalism in the search and seizure area is the purpose of this section.

In order to measure the propriety of police conduct in search and seizure, nationwide, we have conducted a study of search and seizure cases decided at the appellate level in all jurisdictions in the United States in the twenty-seven month period January, 1970 through March, 1972. We will describe briefly the methodology of this study in order to provide this Court with concrete, empirical evidence of the degree to which this country's law enforcement officers have shown themselves capable of conducting lawful and proper searches and seizures in the greatest majority of cases which have been singled out for appellate review.

(1) Source Material.

The source of cases for our study is *Nedrud: The Criminal Law*,[12] which is a monthly survey of all of the reported decisions in criminal law areas which have been decided by every state and federal appellate court in the United States.[13]

Concerning their source material for cases summarized in the Nedrud service, the editors state:

> MATERIAL PREPARATION-COVERAGE
>
> The case summaries for each monthly issue are prepared by the editors from the court opinions published in the Advance Sheets of West's National Re-

12. Nedrud: The Criminal Law, Edited by Duane R. Nedrud and Marguerite D. Oberto, LE Publishers, Inc., 612 N. Michigan Ave., Chicago, Ill. 60611.

13. This study does not include cases decided by the U. S. Supreme Court, but all other appellate cases under which police procedures are judged according to the guidelines laid down by the U. S. Supreme Court. Additionally it does not include obscentity cases in which the ruling on a search and seizure was tied to a ruling on what constitutes obscene matter.

porter System (including the New York Supplement and the California Reporter) for the month preceding the issue's mailing date, e.g., the February service includes the cases reported in the January Advance Sheets. Because the purpose of this service is to provide a permanent research source that is national in scope, the original source material is the National Reporter System rather than state advance sheets or slip opinions directly from the courts themselves.

All points of every case, which points are actually ruled upon by the court, are abstracted and appropriately categorized (so that one case may be cited in several different sections), except where the court gives only perfunctory or memorandum treatment to the questions raised. Also cases which are decided on the sufficiency or "weight" of the evidence are not reported unless a novel point of fact or law is involved.[14]

Thus for the purposes of our study we have used summaries of all of the reported search and seizure cases decided by appellate courts on every level of the judicial system in this country, at least insofar as the courts have considered the issues to be worth detailing in a written opinion in more than a perfunctory manner. Our study encompasses the entire spectrum of appellate opinion on search and seizure in the United States.

(2) The Reasons for Studying Appellate Cases.

We believe that the use of appellate cases in our study presents the most comprehensive picture obtainable of judicial review of police search and seizure procedures. As a general rule, cases which have reached the appellate level have had the most thorough judicial treatment, both parties will have had the opportunity to present briefs and to make oral arguments and the appellate judges will have had the opportunity to review thoroughly the police behavior, presented in the facts of the case and to review,

14. *Nedrud: The Criminal Law* How to Use This Service

in the relatively calm and thoughtful atmosphere of the appellate process, the law of search and seizure as it is applied to the facts.[15]

Further, the appellate courts of this country generally choose to deal with novel or important areas of the law involved, or areas in which substantial questions of individual rights are involved, so that a study of appellate cases presents a very broad range of issues involving police procedures.

Additionally, since our study covers every appellate court in the country the range of judicial opinion on search and seizure issues is the widest possible. Our study, we believe, encompasses a truly national sample of the reported decisions of judges who are, by definition, sufficiently learned in the law to have reached the appellate court level, and who provide a nationwide representation of all possible judicial views with regard to police search and seizure activities.

Finally, since our study covers all of the reported state and federal appellate decisions for the period involved, we are able to see the entire panoply of search and seizure law in the United States brought to bear on the ability of law enforcement officers to deal, properly, with search and seizure problems.

(3) The Types of Cases Studied.

Because we seek in our study to measure police performance in the search and seizure area, we have chosen to consider only those cases classified in the *Nedrud* service as warrantless searches and seizures. Such searches and

15. This is in marked contrast to the motion to suppress stage which, in many of our crowded courts are hurried, even perfunctory, affairs with an overworked prosecutor seeing the case for the first time as he steps up to try the motion and with judges making on-the-spot decisions without a thorough review of the law and the facts. *See*:, *e.g.*, Oaks, supra, at 668.

seizures are truly those in which the policeman, on the street, must make his own decision as to whether to proceed with a given search or not. These are the cases in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions. Such cases, we submit point out as dramatically as possible how today's police officer, dealing in the extraordinarily complex area of search and seizure and operating under this Court's admonition that warrantless searches and seizures are "per se unreasonable" unless they can be otherwise justified,[16] have nevertheless been upheld at the appellate level in their warrantless search and seizure procedures to a truly astounding degree.[17]

The *Nedrud* classifications of cases studied are as follows:

1.1—Arrest and detention—Reasonable Grounds
1.4—Detention: Stop and Frisk
2.3—Search and Seizure Incident to Arrest; Arrest or Search for one offense, seizure for another.
2.4—Autos, Without Warrant
2.5—Persons and Places, Without Warrant.

These categories, we believe, cover the entire range of warrantless searches and seizures by law enforcement officers.

(4) Results of the Study

Of 1,371 cases involving warrantless searches and seizures by the police which were decided by appellate

16. *See; Katz* v. *United States*, 389 U. S. 347, 357 (1967).

17. Some cases involved both warrant and non-warrant procedures; however our study only encompasses those cases in which warrantless procedures were examined.

courts during the 27 month period covered by the study, the police conduct of the search and seizure was upheld as lawful in 1,157 cases and held to be unlawful in 214 cases. Thus six of every seven searches and seizures studied were upheld by reviewing courts; 84% of police search and seizure procedures were found to be proper upon appellate review.

The following is a breakdown by category:

Arrest & Detention:	1970 Lawful	1970 Unlawful	1971 Lawful	1971 Unlawful	Jan.-Mar. 1972 Lawful	Jan.-Mar. 1972 Unlawful
Reasonable Grounds	153	23	184	19	47	5
Detention:						
Stop and Frisk	85	9	76	22	25	3
Search & Seizure Incident To arrest; arrest or search for one offense, seizure for another	57	15	47	15	11	2
Search and Seizure Autos Without Warrant	97	20	154	33	43	6
Persons and Places, Without Warrant	62	18	88	21	28	1
	454	85	549	110	154	19

	Lawful	Unlawful	
1970	454	85	
1971	549	110	
1972	154	19	
	1157	214	= 1,371 Total

We believe that these figures speak for themselves and show an extraordinarily high degree of police professionalism in the area with which we are concerned herein. Our contention is that police professionalism in the search and seizure area is such that the absolute sanctions of the exclusionary rule are no longer constitutionally mandated. When a body of men and women as amorphous as the 440,000 law enforcement officers in the United States is able to compile an 84% record of proper, *warrantless* searches and seizures in cases which have been brought under appellate judicial scrutiny, we believe that the good faith and professionalism of the great majority of our law enforcement officers has been amply demonstrated.

It cannot be said, moreover, that the reason for this excellent record of successful police compliance with the rules of search and seizure is, in fact a product of the Exclusionary Rule, that without the Rule such a record would not have been compiled. Such an argument, in the fact of evidence of substantial lawful police conduct, must be based on the premise that the Exclusionary Rule does in fact deter all unlawful police conduct.

This argument is tenuous at best. Chief Justice Burger, dissenting in *Bivens,* makes a compelling case for the rationale that the Exclusionary Rule does not in fact deter unlawful police conduct. (*See, e.g.,* Oaks, *supra.*). The Chief Justice delineated reasons for the non-deterrence theory, including:

1. The rule does not apply direct sanctions upon individual officers for misconduct, and law enforcement agencies rarely discipline officers responsible for the application of the Exclusionary Rule to a given case.[18]
2. The prosecutor is actually the one who "loses" the application of the Exclusionary Rule to his case, and prosecutors are rarely in a position to impose sanctions upon a police officer for violations.[19]
3. The realities of law enforcement work make it unlikely that policemen will "read and grasp the nuances of appellate opinions that ultimately define the standards of conduct they are to follow.[20]
4. The lapse of time between a given police action and its final judicial evaluation makes it equally unlikely that a policeman will even become aware of the final result of an appellate decision as to his conduct.[21]

If then the threat of the Exclusionary Rule is not an effective sanction to police misconduct, the reason for the

18. 403 U. S. at 416.
19. *Id.* at 417.
20. *Id.*
21. *Id.*

very high incidence of proper police conduct, as indicated by our study, must lie elsewhere. We believe it lies in police professionalism: an attempt by the majority of policemen to know, at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions. We believe that it would do a great disservice to the law enforcement officers, who have compiled the record of successful compliance with search and seizure restrictions as is indicated by our study, to postulate this compliance on a grudging subservience on their part to the Exclusionary Rule. We believe rather that this Court should consider the apellate search and seizure record of the police as described herein as evidence of professionalism and good faith desire to operate as effectively as possible, *within the law.*

Certainly, we do not deny that there is, still, a minority of "bad" policemen who do, on occasion, engage in willful misconduct in the search and seizure area and who engage in substantial and improper invasions of privacy. We believe, however, that our study shows that such "bad" ones are clearly in the minority; and we submit that the absolute sanctions of the Exclusionary Rule are no longer mandated to "police" the entire law enforcement profession because of the few "bad" members (who, incidentally, would hardly be deterred from their unlawful conduct by the Exclusionary Rule anyway).

This leads us then to the question of whether the application of the Exclusionary Rule should be narrowed to encompass only substantial, flagrant, and willful violations of Fourth Amendment rights. We turn to a consideration of this question, in the context of the instant case, in the next section.

III.

THE SCOPE OF THE EXCLUSIONARY RULE SHOULD BE NARROWED TO ENCOMPASS ONLY WILLFUL, FLAGRANT, AND SUBSTANTIAL VIOLATIONS.

We have contended in the first two sections of this argument that:

a. The Exclusionary Rule has had a definite adverse effect upon law enforcement in this country and consequently upon the rights of the law abiding members of our society to be reasonably free from criminal harm, and

b. Based on a study of current appellate search and seizure cases, today's law enforcement officers are, in general, sufficiently professional that the absolute sanctions of the Exclusionary Rule are not Constitutionally necessitated to "police the police."

The instant case provides an excellent vehicle for this Court to consider the narrowing of the Exclusionary Rule requested by the Petitioner. Such a narrowing was suggested by Chief Justice Burger in his dissenting opinion in *Bivens*. After stating that he could not countenance doing away with the Exclusionary Rule *entirely* unless proper alternatives to restrain and punish unlawful police conduct were set up, the Chief Justice, nevertheless stated:

> Independent of the alternative embraced in this dissenting opinion, I believe the time has come to reexamine the scope of the Exclusionary Rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced. 403 U. S. at 424.

With this in mind it is appropriate to consider the facts of the instant case. First of all, it seems clear that the "violation" involved in searching Respondents' garbage after the garbage collectors had picked it up and

segregated it, at the request of the police, was not a willful violation. This is surely evidenced by the fact that of eleven judges reviewing the police conduct in question in the instant case, at least six felt that the police conduct was proper. It would indeed be difficult to accuse the police officers of willful misconduct when so large a percentage of reviewing judicial officers believed that there was no violation at all.

Next the "violation" was not substantial. Had the officers in this case, upon receipt of the first anonymous tip, entered Respondents' house, without further ado, to make the arrest and search, certainly the *amici* herein, and, we suspect, the State of California, would not be before this Court attempting to justify such police conduct. Such activities would have constituted a flagrant (and perhaps a willful) violation and even under the "narrowing" doctrine sought in this case the Exclusionary Rule would have properly been applied. But the officers did *not* make an entry based on a mere unsupported tip. Rather, they sought to gain, through proper independent investigation and surveillance, sufficient corroborating evidence to establish probable cause for an arrest, and they only acted after they felt that they had established such probable cause.[22] Thus, whereas an entry to arrest based on the original tip would have obviously been a substantial violation of Respondents' rights, the police activity which actually transpired is, we submit, a relatively insubstantial violation.

Certainly the police were attempting to follow the rules of search and seizure under the facts of the instant case as,

22. While it is true that the police made a warrantless entry to arrest and search *after* they had examined the garbage, the entry was made in 1968, prior to this Court's decision in *Chimel* v. *California*, 392 U. S. 752 (1969), which prohibited extensive warrantless searches of premises incident to an arrest. At the time that the police acted in the instant case they were acting well within the strictures of California law. *People* v. *Chimel*, 68 Cal. App. 2d 436 (1968).

we believe, based on the search and seizure study presented in Section Two of this argument, most policemen do.

Should, then, Respondents be freed because four judges of seven sitting on the California Supreme Court felt that the police "blundered"? We do not believe that they should, at least not based upon the non-willful and insubstantial "violation" of their Fourth Amendment rights which the facts of the instant case disclose. Thus is presented to this Court in clear focus the narrowing the Exclusionary Rule sought by Petitioner and *amici* in the instant case.

We believe a holding that non-willful, insubstantial "violations", such as occurred in the instant case, should not automatically invoke the absolute sanctions of the Exclusionary Rule would have a salutary impact on the effectiveness of law enforcement without doing violence to basic and fundamental civil liberties. What we seek is a balancing approach in such cases rather than the currently prevailing absolutist approach taken towards the application of the Exclusionary Rule. The Exclusionary Rule should not be done away with completely (at least until suitable legislative alternatives to it can be found); but we believe that it should only be applied to willful, flagrant, substantial violations and that a decision as to the application of the Exclusionary Rule should be made based on the facts of each case.

Our position with regard to the selective application of the Exclusionary Rule would not, of course, leave aggrieved parties without a remedy. Civil actions in false arrest, invasion of privacy, malicious destruction of property and relief under the Federal Civil Rights Act[23] would remain. And under the theory advanced by *amici* herein, the full

23. This Court in 1971 specifically held the Federal Civil Rights Act applicable to search and seizure violations by Federal Officers and, by implication, to state officers. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971).

sanctions of the Exclusionary Rule would remain for willful and substantial violations. The position which we advocate does not dispense with the Exclusionary Rule entirely, but rather would merely permit the courts to weigh, on the one hand, the application of the Exclusionary Rule, and on the other the right of society to convict those defendants whose factual guilt is evident, notwithstanding certain violations of Fourth Amendment rights, which violations have been found by a trier of fact to be insubstantial and non-willful.

One final point should be made with regard to our argument in this brief. Chief Justice Burger in his dissent in *Bivens* quite properly expressed his concern that if the Exclusionary Rule were to be completely overruled, law enforcement officers might receive the impression that there were no constitutional restraints upon their conduct.[24] We believe that the police profession in this country would come to no such conclusion. The study of appellate review of police search and seizure procedures which we have presented in Section Two of this argument indicates a high degree of desire and a high degree of success by the police in complying with search and seizure laws and rules. We do not believe that a narrowing of the application of the Exclusionary Rule would result in wholesale deviations from the rules circumscribing police conduct. Additionally we emphasize again that we do not advocate doing away with the sanctions entirely, but we advocate rather a balancing test which looks to the extent of the violation rather than to applying the sanction in the current absolutist manner.

Such a narrowing additionally might well have an extremely beneficial effect on police internal discipline. At present *any* Fourth Amendment violation must result in the suppression of evidence and police officials are reluctant to discipline officers for such violations even though vital

24. 403 U. S. at 421.

evidence necessary for a conviction may be lost thereby.[25] The narrowing approach suggested herein would have the effect of exposing those cases of willful and flagrant violations in sharp focus. To give an example, suppose a given police officer did not secure a search warrant for a certain premises simply because he was too lazy to do so, although he had ample opportunity and there were no "exigent circumstances" to excuse his failure. A warrantless search under these circumstances would clearly be a willful, flagrant, and substantial violation, and the Exclusionary Rule would apply. A police chief or a prosecutor under these circumstances could properly call for strict disciplinary measures against the offending officer because the mere application of the Exclusionary Rule under a narrowing doctrine would indicate a willful violation and the officer's dereliction would be brought out in sharp contrast with the conduct of other policemen whose behavior, while technically violative, would not be sufficiently unlawful to invoke the Exclusionary Rule sanctions.

Chief Justice Burger has pointed out that the Exclusionary Rule is today indiscriminately applied to *all* Fourth Amendment violations, and that:

> Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate *Irvine*-type violations of the Fourth Amendment, *Bivens, supra,* at 418.

We argue herein that only those "inadvertent errors of judgment that do not work any grave injustice" should be taken out of the Exclusionary Rule; that the record of the police as described herein in appellate search and

25. See the dissent of Chief Justice Burger in *Bivens*: "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine." 403 U. S. at 416.

seizure cases certainly gives this Court a basis for so holding; and that such a holding, by highlighting the willful and substantial violations in which the Exclusionary Rule would still be applied, would be a useful means of focusing disciplinary action against the few "bad cops" while at the same time neither the majority of good law enforcement officers nor society would continue to suffer because of inadvertent, insubstantial and non-willful police errors.

CONCLUSION.

The Exclusionary Rule has, in today's context, become a widely criticized anomaly in the criminal justice system. Designed to "police the police", it has apparently failed to accomplish this function, while at the same time it has had a direct deleterous impact upon the effectiveness of law enforcement.

We have, herein, presented this Court with an empirical study indicating that during the 27-month period January 1970 through March 1972, appellate courts nationwide have found police conduct in cases of warrantless search and seizure to have been lawful and proper in *six out of every seven—that is, 84% of the cases considered.* We believe that this record bespeaks a high degree of professionalism on the part of our law enforcement officials, and we argue that perhaps the American policeman of 1972 does not need the absolute sanctions of the Exclusionary Rule to "police" his conduct.

Finally, the instant case, on its facts, provides a vehicle for this Court to narrow the scope of the Exclusionary Rule to those cases in which violations are, in fact, flagrant and

willful. We urge this Court to consider such a narrowing approach in the interest of society and in the interest of the effective enforcement of the criminal law.

Respectfully submitted,

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APPENDIX.

Cases in which the absolute application of the Exclusionary Rule has resulted in the suppression of probative evidence of serious crimes and/or the reversal of the conviction of the perpetrators of the crimes.

Coolidge v. *New Hampshire*,
403 U. S. 443 (1971).

On January 13, 1964, Pamela Mason, a 14-year old school girl, left her house on a babysitting assignment. Eight days later her frozen body was discovered in a snow drift just a few miles from her home. Her throat had been slashed, and she had been shot in the head.

The defendant's car matched the description of a car which had been seen on the night Pamela disappeared and at the spot where her body had been found. The defendant, upon his own admission, was a frequent visitor to a laundromat where she posted her babysitting notice, and a knife belonging to the defendant was found in the laundromat. The defendant's wife voluntarily produced two shotguns and two rifles which belong to the defendant and offered them to the police. A subsequent examination of the guns revealed that one of the rifles had fired the bullet which was found in the murdered girl's brain.

Upon the basis of this evidence, the state Attorney General, who was authorized under New Hampshire law to issue warrants, issued an arrest warrant for the defendant and a search warrant for his automobile. Sweepings of dirt and other fine particles taken from the car matched like particles taken from the clothes of the murdered girl. These items were introduced into evidence at trial.

After studying the case for more than five months, the Supreme Court held (5-4) that the search of the automobile was unreasonable. *Although five justices in the majority could not agree as to why the search was illegal, they did find that the search warrant was invalid on the basis that the Attorney General was not a neutral and detached magistrate. Conviction reversed.*

Bowers v. *Coiner*,
309 F. Supp 1964 (S. D. W. Va. 1970).

The defendant Bowers was convicted in state court for the armed robbery of a savings and loan company.

FBI agents with a warrant for Bowers' arrest went to the apartment of one William Eagle where Bowers was a frequent guest and attempted to arouse the occupants. The lights were on but no activity was seen. An agent went to a pay telephone across the street and telephoned Mr. Eagle, the lessee of the apartment. The agent told him that FBI agents were outside the apartment and that they wanted to talk to him. The agent could hear the other agents knocking on the door through the telephone. Mr. Eagle opened the door, and the agents entered and subsequently arrested Bowers who was sleeping in the bedroom. The agents seized two revolvers, a .38 and .25 caliber.

The court held that because the agents had neither announced their authority nor their purpose, the entry and subsequent search and arrest were in violation of the Fourth Amendment.

People v. *Trudeau*,
187 N. W. 2d 890 (Mich. 1971).

On November 6, 1967, during an attempted burglary of a vault at a synagogue in Southfield, Michigan, the night

watchman was killed by blows to his head from a crowbar. One of the few leads was a heel print left at the scene. On November 19, 1967 the defendant was arrested inside a United States Post Office where he had attempted to break and enter a vault.

Because of the similarity between the two jobs, the detective assigned to the murder case attended a preliminary hearing on the Post Office case in order to view the defendant's shoes. His shoes were subsequently removed by two police officers without a warrant and given to the detective.

At trial, the shoes, the imprint, and their comparison by an expert were introduced into evidence and the defendant was convicted of second degree murder. *The court held that the removal of the shoes without a warrant violated the Fourth Amendment. The case was reversed and remanded for a new trial.*

United States v. *Davis*,
423 F. 2d 974 (5th Cir. 1970).

FBI agents in a rural area of Alabama arrested Davis and his son pursuant to warrants charging them with the unlawful flight to avoid prosecution for the larceny of an automobile. Before the arrest procedures were completed, the defendant bolted from the house. He ran towards his house with the agents and his son in hot pursuit. He stopped at the steps, turned, and brandished a .38 calibar pistol. In the gunfire that followed, the defendant's son was wounded. When order was finally restored, the agents cared for the son until an ambulance arrived. They then took Davis to Montgomery.

About three and one half hours later the agents returned to the scene to retrieve Davis' weapon. Although it was after dark, they discovered the pistol immediately upon

alighting from the car because of the reflection of the porch light on the surface of the gun. The gun was recovered from the yard, and the agents left.

The court held that the entry into the yard without a warrant was unreasonable.

Root v. *Gruper*,
438 F. 2d 361 (8th Cir. 1971).

The victim, Lonny Sutton, called the telephone operator saying that his wife had shot him and to call an ambulance because he was dying. The ambulance driver and his assistants found Sutton unconscious from a shotgun wound. On the way to the hospital they passed the marshal who was on his way to the scene of the shooting. Sutton was dead on arrival.

The marshal waited at the residence, which was empty, until the sheriff arrived. Together they entered the house and proceeded to the kitchen where they found a shotgun and shells which were introduced into evidence at trial. *The defendant's conviction was reversed on the basis that the warrantless search of the house was unjustified.*

United States v. *Colbert*,
454 F. 2d 801 (5th Cir. 1972).

In Birmingham, Alabama on the evening of October 24, 1970, two officers, who were on call to another destination, noticed the defendants Colbert and Reese standing empty handed in front of a nightclub. One of the officers noted that Colbert fit the description of a man wanted by the Birmingham police for assault with attempt to commit murder.

After making their call, the police officers observed the defendants carrying expense briefcases near the same location where they had previously been seen. The defendants

began walking towards a parked automobile. The driver of the automobile, spotting the police officers, made a motion toward the defendants and sped off. When the officers got out of their car, the defendants placed their briefcases on the sidewalk and walked away. The defendants denied ownership of the briefcases and refused to identify themselves. One of the officers opened the briefcases and found that each contained a sawed off shotgun of illegal length. *The defendants conviction for possession of an illegal firearm was reversed. The Court (2-1) held that the search of the briefcases and the seizure of the guns without a warrant was unreasonable.*

United States v. *Soriano*,
Case No., 72-25-CR-JE (S. D. Fla.).

On December 23, 1971 a reliable informant advised agents of the Bureau of Narcotics and Dangerous Drugs that one Anna Betancourt, who resided at 3520 S. W. 4th St., Miami, Florida, was expecting the delivery of a large quantity of narcotics. Previously, on December 16, 1971, the informant and Anna Betancourt had purchased a large amount of milk sugar and Christmas wrapping which were to be used to cut and wrap the narcotics. On January 4, 1972, the informant went to the Betancourt residence and was asked to leave because narcotics were on the premises. Surveilling agents then observed a white male and female enter the house empty-handed and exit a short time later with a large paper shopping bag. They then drove to another location, deposited the shopping bag in a trash receptacle, and drove off. The bag, which was retrieved by BNDD agents, contained numerous glassine bags and Christmas wrapping paper which by chemical analysis proved to contain traces of heroin.

The agents prepared an affidavit which recited these facts. The affidavit was then presented under oath to United

States Magistrate who issued the search warrant and handed it to the BNDD agent who had presented the sworn testimony. Unfortunately, the magistrate had failed to insert the name of the agent to whom it was directed.

Upon a motion to suppress, the court found that probable cause existed for the search but the failure to insert an agent's name on the search warrant was fatal error. Result —the suppression of 238 pounds of pure heroin. The case is now on appeal.

Whiteley v. *Warden of Wyoming State Penitentiary*, 401 U. S. 516 (1971).

In 1965, a hardware store and a bar located in Saratoga, Wyoming, a remote part of that State, were the subject of a breaking and entering. The sheriff for that area received a detailed description of the car belonging to the bandits as well as part of the license number. In addition the sheriff received a tip that Whiteley and a companion had probably committed the burglary. The sheriff obtained an arrest warrant and then issued a radio alert. Whiteley and his companion were stopped less than 24 hours later in Laramie, Wyoming in a car fitting the description of that involved in the burglary. Whiteley gave the arresting officer a fictitious name, but the officer recognized the companion. The two were arrested, and objects which had been stolen from the hardware store and the bar were found in the car.

At trial, the companion testified in vivid detail how he and Whiteley had accomplished the burglaries, and the stolen items were introduced into evidence. Whiteley was convicted and the case was affirmed on appeal. *Six years and several habeas corpus petitions later, the U. S. Supreme Court held that the search was unreasonable. Conviction reversed.*

Whiteley had previously been convicted of three felonies and had served six terms in the state penitentiary.

Von Utter v. *Talloch*,
426 F. 2d (1st Cir. 1970).

A confidential informant known to the police as a user of narcotics, advised that Von Utter would arrive in Provincetown, Massachusetts between March 8th and 10th driving a white volkswagen two door sedan with Connecticut registration JJVU and that the car would contain marijuana and LSD.

The police, who had obtained a search warrant for the automobile, approached the defendant as he emerged from a drugstore and advised him that they had a warrant to search his car. The defendant stated that there would be no need—that he would do it himself. He then reached into the glove compartment, seized some contraband, and fled on foot. The police gave chase, apprehended him, and placed him under arrest. They then searched the car and found a quantity of narcotics. His 1968 conviction in state court was overturned more than three years later on a habeas corpus petition to the Federal court. The court held (1) that the affidavit for the search warrant was inadequate since the informant's tip was too vague to be of any value and (2) the search could not be justified as being incident to a lawful arrest.

United States v. *Sokolow*,
450 F. 2d 324 (5th Cir. 1971).

A police officer, investigating the theft of cigarettes, observed the suspect's car back up to Sokolow's garage. The officer saw the cigarettes in the back seat of the car and arrested the suspect. He then noticed a large number of room air-conditioners (29) located in the garage and proceeded to an adjacent motel to question Sokolow about the air-conditioners. After being advised of his rights, Sokolow stated that he had purchased the air-conditioning

units from a local appliance dealer and produced receipts to that effect. The officer examined the receipts and noticed some discrepancies. Sokolow and the officer then walked to the garage where the officer recorded the serial numbers on two of the units.

An N. C. I. C. check of the serial numbers revealed that the units had been stolen, and the appliance dealer advised that Sokolow's "receipts" were estimates and not receipts. Sokolow was arrested and subsequently convicted. *The Court of Appeals, however, ignored many of these facts and held that the taking of the serial numbers without a search warrant was an unreasonable search and reversed the conviction.*

United States v. *Kaye*,
432 F. 2d 647 (D. C. Cir. 1970).

Agents of the FBI, who were investigating the theft of Government property, searched the defendant's premises pursuant to a search warrant and seized several items which were later admitted into evidence.

The affidavit asked for a search warrant for "the entire premises of 3618 14th Street, N. W., Washington, D. C., a two story brick building used for the sale and service of TV's, stereos, records and with a large sign reading Fredrick L. and Company." The search warrant issued by the court was captioned "[e]ntire premises, 3618 14th Street, N. W." and authorized the search of "the premises known as 3618 14th Street, N. W."

The entire building was leased to defendant. The defendant's store and shop occupied the first floor and basement, and the second floor was occupied as the defendant's living quarters. Although there was no question about the existence of probable cause to search, the court held that the search warrant did not authorize the search of the second floor apartment regardless of the language in the support-

ing affidavit which might be construed more broadly. The language was the same except for the description "a two story brick building" which was included in the affidavit and not the warrant.

State v. *Madden*,
465 P. 2d 363 (Aug. 1970).

James Beck was riding his bicycle along Camelback Road in Phoenix shortly after 3:00 a.m. on October 18, 1967, when a Cadillac pulled alongside of him and forced him off the road. Several assailants emerged from the car, grabbed Beck around the neck and body, forced him into an irrigation ditch, and robbed him of his watch, wallet, checkbook, money and keys. The victim called the police and an emergency bulletin was sent out on the police radio.

At 3:18 a.m. the Cadillac was seen and stopped by the police. The defendants were taken into custody and the car was garaged. About a half an hour after defendants were arrested, the vehicle was searched and the stolen items found.

The court held that the warrantless search of the automobile was not justified. Reversed.

State v. *Brown*,
260 A. 2d 716 (R. I. 1970).

A police officer observed a red Ford convertible, occupied only by the driver, turn into the driveway of an office building and extinguish its lights. The automobile was strange to that area. The officer next observed the automobile occupied by four persons backing out onto the highway. The driver stopped, alighted from the automobile and approached the officer. When the other occupants started to advance on the officer, he made them get back into the car. At that time he observed a duffle bag stuffed with objects, a pry bar and check-making machine.

The occupants were taken to the police station for questioning. Approximately 30 minutes after they were initially stopped, the police chief walked out to the car where in addition to the above objects he saw two pairs of gloves on the front seat and a walkie-talkie protruding from under the seat. In the interim the police had received a report of a breaking and entering of the office building at the location where the car had been stopped.

The Rhode Island Supreme Court complimented the police officer for good police work and stated that while a search of the car would have been permissible when the suspects were stopped, the search 30 minutes later was not. Conviction reversed.

Hair v. *United States*,
289 F. 2d 894 (D. C. Cir. 1961).

In *Hair*, police officers were called to investigate a housebreaking, robbery and rape. During the course of this investigation, the victim made a photographic identification of Hair and Burroughs, and a tentative identification of Blakeney. The police immediately went to Hair's house to place him under arrest. As they approached the house, about seven or eight feet from the door, Blakeney opened the door, began to step out, and then turned and ran up the stairs. The officers, without giving notice of their identity or purpose, immediately entered and gave chase. Blakeney dived through a window and escaped. He was subsequently apprehended and identified by the victim. While passing through Hair's house, the officers observed several items which matched the description of the stolen goods. Based upon this observation, they obtained a search warrant and seized these items which were introduced in evidence of Hair's trial. *On appeal, the United States Court of Appeals for the District of Columbia reversed Hair's conviction on the ground that the failure by the*

police to stop and announce their identity and purpose before entering Hair's house tainted the evidence seized and therefore it was improper to admit those items in evidence at Hair's trial. Judge Bazelon wrote the opinion of the court. Judge Miller dissented.

Woods v. *State*,
466 S. W. 2d 741 (Texas 1971).

A woman who lived alone was awakened in her bedroom by the defendant. He threatened her with a knife, robbed her, and raped her while she was forced to lie on her stomach with a pillow over her head. With the aid of a night light she saw the knife and also noticed that the defendant was wearing leather boots.

As soon as the defendant left, the woman called the police who searched the area and found boot tracks outside the house. The police traced the tracks from the woman's house to the vicinity of the defendant's house. After knocking and entering, the officers observed the defendant standing with boots on. He was questioned and told to go outside and place his boots in the boot tracks. Later, the boots were confiscated and defendant was taken before a magistrate. One of the officers returned to defendant's house, conducted a warrantless search, and found the knife used in the rape.

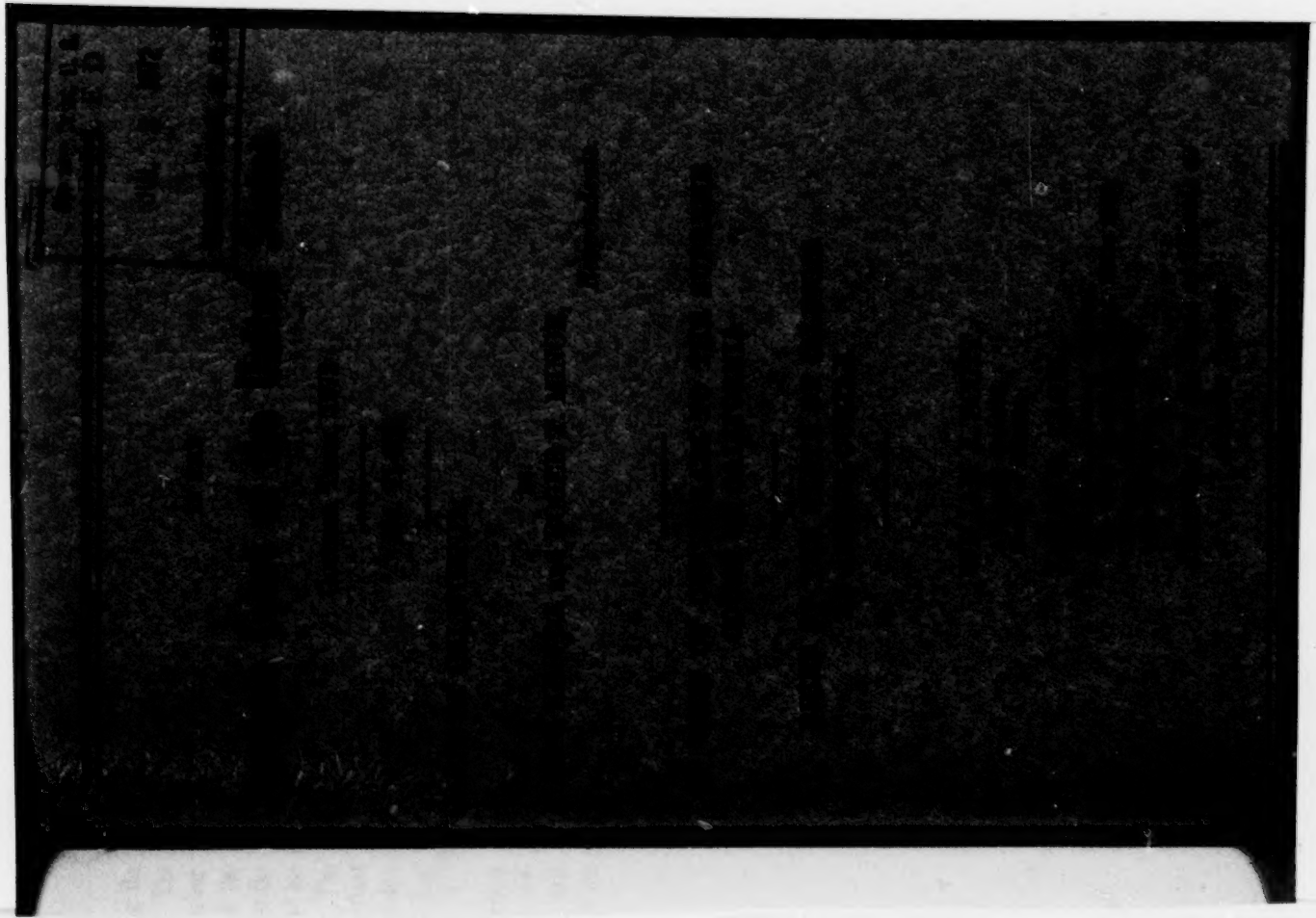
Defendant's rape conviction was reversed with the court holding that the arrest and search, without a warrant, were illegal.

State v. *Barwick*,
483 P. 2d 670 (Idaho 1971).

A man was returning to his camper when he was attacked by two men. He was struck to the ground, jumped on, and choked by defendant whom he later positively identified. Defendant took the man's billfold and ran off.

The victim notified police and as they were cruising the area, they noticed a car traveling with a flat tire. The police proceeded to follow the vehicle as it rapidly accelerated and then slowed down. The officers stopped the vehicle and the defendant got out and walked back to the patrol car. While the defendant was attempting to find his driver's license, the officer noticed blood on his hand. The defendant was then arrested for vagrancy. The defendant was advised of his *Miranda* rights after which the police asked him if they could search his automobile and he consented.

While defendant was out on bond for the vagrancy charge, he was arrested for robbery. *The defendant's conviction was subsequently overturned and the evidence was suppressed by the Idaho Supreme Court which found the initial arrest illegal.*



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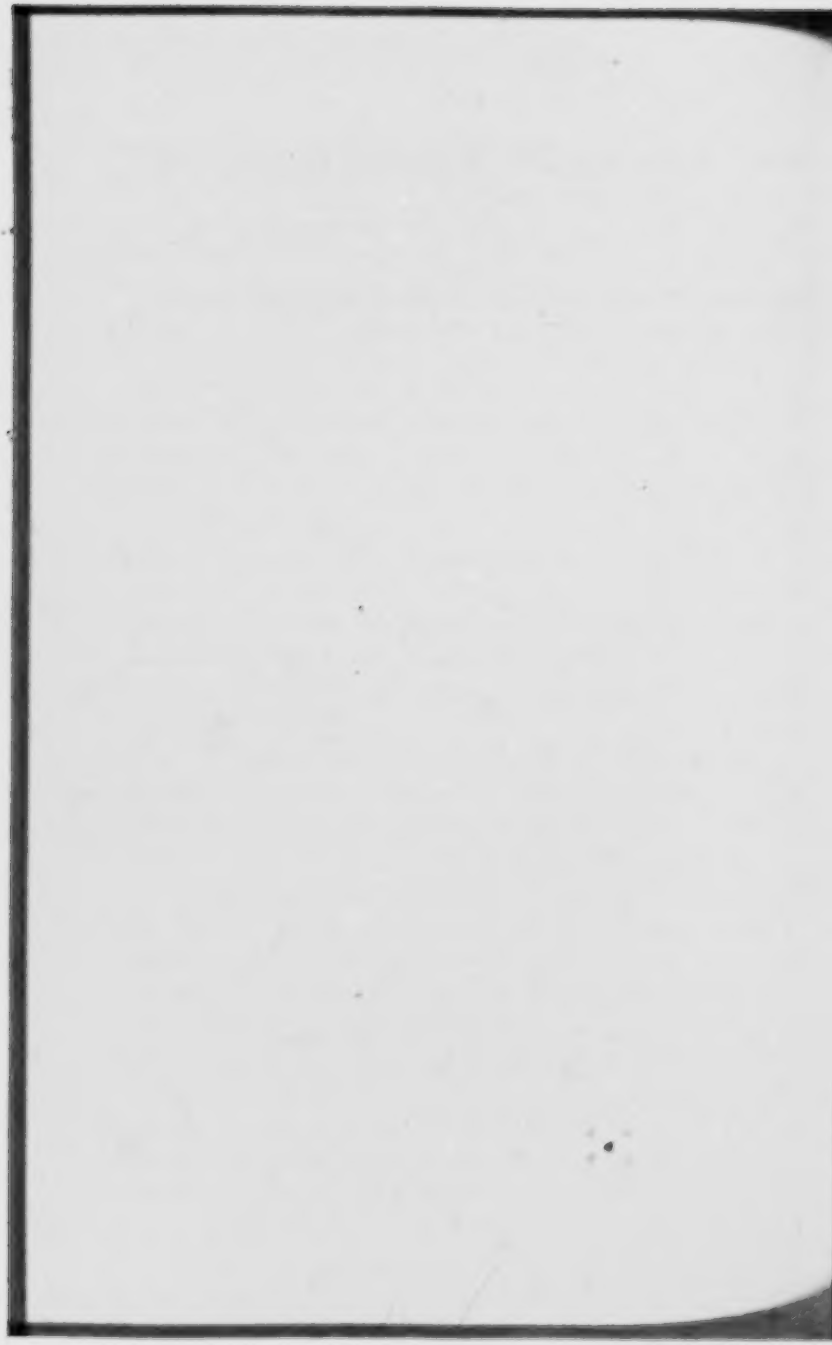

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH KRIVDA and ROGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the scope and application of the exclusionary rule. In particular the Supreme Court of Illinois has always followed applicable federal precedents in search and seizure cases. The cognate provisions of the Illinois Constitution are construed as identical in scope and effect as the provisions of the Fourth and Fifth Amendments of the United States Constitution. See *People* v. *Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944). Initially, the Supreme Court of Illinois refused to apply the exclusionary rule. See *Trask* v. *People*, 151 Ill. 523, 529 (1894). After the adoption of the exclusionary rule in federal courts, the Illinois rule was changed in reliance upon the opinions of this Court. See *People* v. *Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *People* v. *Castree*, 311 Ill., 392, 143 N.E. 112 (1924); *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N.E. 2d 505 (1955). It is therefore reasonable to assume that any change in the exclusionary rule made by this Court will affect directly the rules applied by the state courts.

THE RULE EXCLUDING EVIDENCE IMPROPERLY SEIZED SHOULD BE APPLIED ONLY WHEN THE SEIZURE CONSTITUTES A SUBSTANTIAL VIOLATION OF RIGHTS AND ONLY AFTER THE COURT WEIGHS THE QUESTION OF EXCLUSION IN LIGHT OF THE PUBLIC INTEREST IN OBTAINING RELIABLE EVIDENCE FOR THE PROSECUTION OF SERIOUS CRIMES OF VIOLENCE.

I

The exclusionary rule in search and seizure cases has been the subject of intense debate throughout its existence. The commentary is substantial.

The historical and logical foundations of the rule have been ably and persuasively criticized. See Wigmore, "Using Evidence Obtained by Illegal Search and Seizure", 8 A.B.A.J. 479 (1922); Plumb, " Illegal Enforcement of the Law", 24 Cornell L.Q., 337, 354-58, 370-81 (1939); Wigmore, *Evidence*, Secs. 2183-84a (McNaughton Rev. 1961). Nearly every civilized nation in the world has survived as a civilized nation without the benefit of the exclusionary rule. See "The Exclusionary Rule Under Foreign Law" 52 J. Crim. L. C. & P.S. 270 (1961). (series of articles). To our knowledge, no civilized nation has an absolute rule which mandates the exclusion of evidence regardless of social interests which support its admission. See *Lawrie* v. *Muir* [1950] Scots L.T.R. 37.

The policy arguments against the rule have been well stated. See Burger, "Who Will Watch the Watchman", 14 Am. U. L. Rev. 1 (1964); Oaks, Studying the Exclusionary Rule In Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). And concern over the validity of the rule has not been confined to academicians, prosecutors and policemen in

recent years. See *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 411 (1971) (Burger, C. J. dissenting); *Coolidge* v. *New Hampshire* 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J. concurring) (Black and Blackmun, JJ, concurring and dissenting).

II.

At the risk of repeating what has been said before, we think it appropriate to restate our objections to the exclusionary rule.

On ethical grounds, the rule in its direct application, seems unfair. It benefits only the guilty. The innocent man whose rights are violated must sue civilly to secure damages; he must pursue a remedy that this Court has found to be ineffective. Further, the application of the rule punishes society and not the offending officer.

In terms of judicial administration, the rule requires diversion from the fundamental concerns of guilt or innocence. At the very least, the determination of the ultimate question is substantially delayed and witnesses for both sides become discouraged or unavailable. At the worst, counsel for defendants become so concerned with the question of suppression that they never seriously prepare for trial or explore defenses on the merits.

The public perception of the delay, the procedural gamesmanship and the clear benefit to the guilty serves to diminish confidence in the courts.

The exclusionary rule creates a haven for a corrupt policeman or prosecutor. The rule allows the officer to immunize an offender while appearing to do an aggressive job of law enforcement. An officer may conduct a massive gambling raid without securing adequate evi-

dence of probable cause. The officer appears to be doing his job cracking down on gambling only to be frustrated by the courts. The officer may reap both the benefits of public approval and consideration from the gambler. One study found that "an examination of the records and a period of observation of this practice in the court is fairly convincing that the raids are made to immunize the gamblers while at the same time satisfying the public that gamblers are being harassed by the police." Dash, "Cracks in the Foundation of Criminal Justice," 46 Ill. L. Rev. 385, 392 (1951). See also, Peterson, "Restrictions in the Law of Search and Seizure," 52 NW. L. Rev. 45, 57-58, 58-59 (1957). The courts are compromised by aiding this kind of corruption. And the courts, not the police, are the recipients of public disapproval when they suppress meaningful, or overwhelming evidence. The corrupt policeman blames the courts for his ineffectiveness and the Courts cannot respond.

The exclusionary rule is thought to deter illegal police conduct. There is no evidence that proves this is so. See Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). The fact that there is no proof of deterrence should cause the rule to be abandoned. If due process requires the exclusionary rule, it would seem clear that the proponent of the rule ought to sustain the burden. It seems clear to us that even without statistics a realistic analysis of the incentives and pressures upon the police would show that the exclusionary rule cannot deter.

The primary pressure upon the police is to apprehend criminals and prevent crime. It is an unceasing public pressure which arises not from some irrational public prejudice but from the indisputable assessment that

crime is both an ethical and social evil.[1] Further, there is the internal standard of every ordinary man in law enforcement that murderers, robbers, etc., ought to be punished for their crimes. The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury. The rule fosters false testimony by law officers who feel they must apprehend offenders and are fearful that minor technical errors will result in their escape. In short, police officers who would not alter their testimony in any respect to help the prosecution establish guilt may well be driven to such extremes when the question is not one of guilt but rather of the admissibility of reliable evidence.

There are institutional pressures which work against deterrence. The police organizational structure asks the policeman why he didn't arrest rather than why he did.[2] The police encourage seizure of contraband and place a premium on police alertness. The desire to prevent crime often causes the police to engage in practices which are not permitted when the object is the prosecution of offenders.[3] The police structure is responsive to public

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1. There are similar pressures upon courts to distort probable cause concepts in order to sustain the admissibility of evidence. See Brinegar v. United States, 338 U. S. 160, 183 (1949).

2. One eminent judge has adopted a standard for search and seizure which reflects this concern: "When a police officer could justifiably be disciplined for failure to act, his action can hardly be characterized as unreasonable." People v. Moore, 35 Ill. 2d 399, 403, 220 N. E. 2d 443, 445 (1966) (Schaefer, J.).

3. In this case the problem was present. According to both opinions in the case, the police were informed that

norms. The police do not feel morally blameworthy because the public does not condemn. See Skolnick, *Justice Without Trial,* 219-26 (1966). La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 442-44 (1965).

It is this abiding, powerful and rational pressure to suppress crime that leads police to prefer, in many cases, to engage in the forbidden practices and forego prosecution. The Court has recognized the inability of the rule to deter in certain contexts. See *Terry* v. *Ohio,* 392 U. S. 1, 12-15 (1968). Studies have shown that the police have an incentive to arrest without any thought of conviction. An arrest disrupts illegal business and clears the streets for a time. Narcotics and weapons are destroyed and the arrestee bears the costs of freeing himself through court action. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 422-29, 447-55 (1965); Waite, "Police Regulation by Rules of Evidence," 42 Mich. L. Rev. 679, 685-87 (1944). It is important to reiterate that the police do not act out of malice, they act because the public demands that they act and that demand is more forceful than the demands made by judges.

It is our view that the only effective control upon police conduct is the community in which the police function. Excesses and abuses of police power occur rarely because the citizens will not tolerate them, not because the police fear that months later a judge will suppress

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respondents were injecting respondent's two children with methedrine. Upon checking the premises the police did observe two children. There were additional circumstances which would lead any law officer to consider the necessity for prompt action to rescue the children even at the cost of ruining the prosecution.

evidence they seize. In our experience, the only effective means of changing police procedures which aggrieve segments of the community is by community pressure. The exclusionary rule has been in effect in Illinois since 1923 and yet there is no evidence that complaints concerning police abuses have diminished. In one city in Illinois, it is claimed that one minority group is persistently harassed by police. Though many allegations have proven unfounded, there have apparently been enough incidents to cause several changes in police procedure and high ranking personnel. The incentive for change was not a new rule of court or a far-reaching opinion but rather the pressure of citizens groups. In light of several recent jury verdicts acquitting unpopular defendants, it seems absurd to argue that the community will tolerate police excesses against minority groups.

In this connection, it is worth observing than an officer who acts in good faith is not going to be deterred by the exclusionary rule. See Horowitz, "Excluding the Exclusionary Rule," 47 L. A. Bar Bull. 91, 92 (1972). By definition, such an officer acts because he thinks, albeit mistakenly, that he is acting within the law. The officer who acts in bad faith will not be deterred either. "The officer who takes bribes or shakes down prisoners, or extorts money on threat of arrest, or brutally mistreats prisoners or otherwise consciously abuses his authority can be controlled only by the imposition of direct penalties . . . the exclusionary rule has no impact in such a situation." Barrett, "Exclusion of Evidence Obtained by Illegal Searches," 43 Calif. L. Rev. 565, 592-93 (1955).

The incentives and pressures which work against the exclusionary rule are not the only factors which account for its limited value as a tool of deterrence. The rule

itself is applied in a context inimical to its purposes. There is, first, a distinct failure to communicate the rules of search and seizure laid down by courts to the police in a manner comprehensible to the police. La Fave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich. L . Rev. 987, 991-93, 1003-1008 (1965). There is also the admitted failure of courts to prescribe consistent and comprehensible rules governing search and seizure. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 483 (1971). It may be inherently impossible to devise coherent Fourth Amendment precepts. If that is the case then the exclusionary rule is clearly out of place. It is unreasonable to expect deterrence when the subject does not know what he is forbidden to do. The lack of clarity in the law contributes to both public and police disrespect for the rules of search and seizure. Nothing is more incomprehensible to the policeman who accepts judicial supervision of searches by securing a warrant than to have another court say that the first court was wrong in issuing the warrant. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 411-415 (1966).

There is a particularly striking and inexplicable anomaly in our treatment of police officers vis a vis lawyers. We excuse a lawyer who mistakenly judges a law to be constitutional and advises his client to plead guilty. See *Brady* v. *United States,* 397 U.S. 742, 756-757 (1970). Yet by a divided court we condemn a police officer who decides to search upon his mistaken judgment that he has met the requirements of the law. It is unfair to tax an officer, usually a layman, with the endless permutations of search and seizure law. The appearance to the officer is that the law is capricious and meaningless, an attitude which scarcely encourages eager compliance.

III.

Many who recognize the validity of objections to the rule will advocate that the rule not be abandoned until a reasonable alternative is provided. The most popular suggestion for an alternative is to provide a remedy reminiscent of Industrial Commission (Workmen's Compensation) procedures. See Horowitz, "Excluding the Exclusionary Rule, Can There Be an Effective Alternative," 47 Los Angeles Bar Bull. 91, 94 et seq. (1972); Barrett, Exclusion of Evidence Obtained By Illegal Searches, 43 Calif. L. Rev. 565, 594-95 (1955). *Bevins* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 422-23 (1971) (Burger C. J. dissenting).

It seems to us that concern over a viable alternative should not prevent this Court from reconsidering the exclusionary rule. If the exclusionary rule were effective and meaningful as a deterrent, it might be proper to ponder the necessity for replacing it with something else. But it appears that the exclusionary rule cannot and does not serve the purpose of deterrence. If the exclusionary rule has no deterrent effects, its absence will not leave a void to be filled. It might be said that an outright abolition of the exclusionary rule may have a symbolic effect and encourage police abuse. We doubt that this would occur. The public resentment of arbitrary police conduct is now and will remain the primary restraint on the police. Further, the continuation of the exclusionary rule will encourage the other police abuses attendant upon the administration of the rule.

This Court need not resolve the issues presented by a complete abandonment of the exclusionary. Instead, a more modest approach can and ought to be pursued.

The exclusionary rule in federal cases was adopted in *Weeks* v. *United States,* 232 U.S. 383 (1914). The crime there was use of the mails to transport lottery tickets. The police action there was conducted without any authority. It consisted of a complete search of the room of the defendant in his absence and a seizure of his private letters and correspondence and other private papers. Under the rule in *Boyd* v. *United States,* 116 U.S. 616 (1886), the seizure may well have violated the Fifth Amendment.

The exclusionary rule was imposed upon the States in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The conduct of the police in that case can properly be characterized as flagrant. The offense charged could not today be constitutionally classified as a crime. See *Stanley* v. *Georgia,* 394 U.S. 557 (1969). The Court held that it must exclude "evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy]" 367 U.S. at 654-55.

The nature of police conduct in both *Weeks* and *Mapp* was exceptionally violative of the suspect's rights. Indeed, in neither case, did the officers attempt to defend their actions on the merits or as taken in good faith. No rationale appears in either case for applying the exclusionary rule to reasonable, good faith but erroneous action by the police.

Judge Friendly has suggested that "the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965). See also A.L.I. *Model Code of Pre-Arraignment Procedure,* §8.02 (2) (Tent. Draft No. 4, 1971). It

appears to us at least that this is what *Mapp* said. When Mr. Justice (then Chief Judge) Cardozo rejected the idea that the criminal should go free because the constable "blundered"[4] he meant exactly what he said. A blundering constable was not the subject of *Mapp*, rather there a deliberate, methodical violation of a suspect's rights was involved.

The exclusionary rule ought to be applied also in light of the severity of the crime involved. Justice Cardozo's opinion in *People* v. *Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People* v. *Defore*, 213 App. Div. 643, 652; 211 N.Y.S. 134, 142 (1925).[5]

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4. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

5. " . . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. Brinegar v. United States, 338 U.S. 160, 183 (Jackson J. dissenting).

The ethical quandary posed by the application of the exclusionary rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The exclusionary rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of Evidence Obtained By Illegal Searches,* 43 Calif. L. Rev. 565, 581 (1955).

In this case, the crime does not involve violence nor is it an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the exclusionary rule. Nevertheless, it is a factor that ought to be considered whether it weighs in favor of the prosecution or the defense.

The other factor that ought to be considered is the nature of the police conduct. In this case, it is clearly inappropriate to characterize the police conduct as flagrant, deliberately abusive of basic rights or intentionally violative of obvious rules governing search and seizure.[6] It is difficult to characterize police conduct approved by three judges of the California Court of Appeal and three justices of the California Supreme Court as flagrant and obviously illegal.

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6. This assumes, arguendo, that the trash was protected by the Fourth Amendment. On that issue we agree with the petitioner and join its argument. See United States v. Jackson, 448 F. 2d 963, 971 (9th Cir. 1971).

It has never been adequately explained why a case like *Mapp* involving extremely flagrant police misconduct used for the prosecution of the most trivial offense leads to the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Without that explanation the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the exclusionary rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The exclusionary rule has assumed a scope far beyond the justifications offered when it was put upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully urge the reversal of the judgment below and the adoption of the suggested modifications of the rule in *Mapp* v. *Ohio*.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-651

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

STATE OF CALIFORNIA,
Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S OPENING BRIEF

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IN THE

Supreme Court of the United States

October Term, 1972
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STATE OF CALIFORNIA, *Petitioner,*

vs.

JUDITH H. KRIVDA and RODGER T. MINOR, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S OPENING BRIEF

Opinion Below

The opinion of the California Supreme Court is reported as *People v. Krivda,* 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). A copy of this opinion is set forth as Appendix A to the Petition for Writ of Certiorari.

The prior opinion of the California Court of Appeal, Second Appellate District, Division One is reported as *People v. Krivda,* 91 Cal. Rptr. 219 (1970). The Court of Appeal opinion was superseded when the California Supreme Court granted a hearing pursuant to Rule 28 of the California Rules of Court. Consequently the Court of Appeal opinion appears only in the unofficial reports. A copy of the Court of Appeal opinion is set forth as Appendix C to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the California Supreme Court was filed on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. (Petn. for Cert., Apps. A & B.) The Petition for Writ of Certiorari was filed November 12, 1971, and was granted April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purpose of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to the commingling of the contraband with the trash of other persons?

2. Whether, in any event, application of the exclusionary rule is constitutionally compelled under the circumstances of the present case?

Constitutional Provisions Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. History of the Case

On September 18, 1968, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging respondents Judith H. Krivda and Rodger T. Minor with possession of marijuana in violation of section 11530 of the California Health and Safety Code. (App. p. 2.) Respondents' motion to set aside the information pursuant to California Penal Code section 995 was denied. (App. p. 3.) Respondents thereafter entered pleas of not guilty. (App. p. 4.)

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing[1] and on further testimony adduced at a hearing on that motion.[2] (App. pp. 5-6.) The motion to suppress evidence was denied at the conclusion of the hearing held on October 24, 1969. (App. p. 6.) On December 12, 1969,

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[1]The Reporter's Transcript of the preliminary examination is set forth verbatim at pages 10-76 of the Appendix.

[2]The transcript of the additional testimony presented at the hearing on the motion to suppress evidence is set forth at pages 77-83 of the Appendix.

the trial court, with the same judge presiding, permitted the respondents to reopen their motion to suppress evidence. On the basis of the same evidence and arguments previously presented, the trial court reversed its ruling and granted the motion to suppress evidence. On petitioners' representation that no other additional evidence existed, and on the court's own motion, the action was dismissed in the interests of justice. (App. p. 7.)

Petitioner appealed to the California Court of Appeal, pursuant to California Penal Code section 1238, subdivision 7,[3] from the order of the superior court suppressing evidence and dismissing this cause. (App. p. 8.) On November 16, 1970, Division One of the California Court of Appeal for the Second Appellate District reversed the judgment and order of the superior court in an opinion set forth in Appendix C to the Petition for Writ of Certiorari.

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda*, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). (*See* App. A, Petn. for Cert.) On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* App. B, Petn. for Cert.)

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[3]Penal Code section 1238 provides:

"An appeal may be taken by the people from any of the following:

". . . .

"7. An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. . . ."

B. Statement of Facts

On July 1, 1968, Officer Stephen C. Gates of the Los Angeles Police Department received a telephone call from an anonymous female informant who told him that "Rodger" and "Judy" were engaging in narcotic activities, *i.e.*, smoking marijuana and injecting methedrine. (App. pp. 12-13.) The informant indicated that there were many sex parties at their 1901 Nolden residence in Los Angeles and that a Lesbian named "Frankie" was living there. The informant also indicated that both Rodger and Judy were injecting the two children who resided at that location with methedrine. The informant said that she had heard this from Judy, who said she enjoyed the effects of methedrine and that she also wanted her children to experience the feeling of being under the influence of methedrine. (App. pp. 12-13.)

After receiving this information, Officer Gates and his partner, Officer William Marsden, located the address and observed two young female children in front of the premises. Officer Gates then ran a utility check which indicated that Judy Krivda was paying for the utilities at 1901 Nolden. (App. pp. 13, 48.) Officer Gates also checked criminal records with the Los Angeles Police Department and determined that three individuals with the last name of Krivda had been arrested in Los Angeles. Upon further investigation Officer Gates discovered that one of these individuals, Edward Joseph Krivda, had a wife named Judy. (App. p. 13.) The records also indicated that Edward Joseph Krivda had been arrested for possession of dangerous drugs for sale and also for sale of dangerous drugs. (App. p. 14.)

At about 11 a.m. on July 9, 1968, Officer Gates and his partner returned to the vicinity of 1901 Nolden. The residence at that address was a single family dwelling. (App. p. 14.) From their vantage point, the officers observed several trash barrels directly in front of the house at 1901 Nolden. (App. pp. 14-15, 17.) The trash barrels were in the parkway adjacent to the sidewalk, thirty to forty yards from the house. (App. pp. 17, 28.) The home adjacent to 1901 Nolden was approximately twenty feet down the hill. (App. p. 15.)

The officers observed refuse collectors approximately a block away from the house at 1901 Nolden. (App. p. 14.) Officer Gates stopped the collectors approximately half a block west of the premises. (App. pp. 14, 18.) After identifying himself as a police officer, Officer Gates told the trash collectors that he was interested in looking at the contents of the trash barrels in front of 1901 Nolden. (App. pp. 14-18.) He asked them to empty the well of their truck, to pick up the trash in front of the house at 1901 Nolden, and then to meet Officer Gates and his partner approximately one block north of the location. (App. pp. 14, 18, 70.)

Officer Gates observed the refuse collectors drive their truck to the front of the premises at 1901 Nolden. He observed them go to the back of the truck, take the trash barrels, place the contents of the trash barrels in the well, and then drive north to where he and Officer Marsden were waiting. Officer Gates had examined the well of the trash truck prior to the emptying of these specific garbage cans into the well. There had been no refuse at all in the well prior to the emptying of the garbage cans at 1901 Nolden. Officer

Gates did not observe the collectors empty any other garbage cans into the well of the truck between the time they placed the trash from those cans into the well and the time the truck arrived at his location. (App. pp. 18-19.)

When Officer Gates examined the contents of the well of the trash truck, he observed approximately five brown paper sacks among the refuse. Upon examining the sacks, he found that they contained what appeared to be marijuana debris and marijuana seeds. (App. p. 19.) In one of the bags, Officer Gates found approximately four to six partially burned marijuana cigarettes. (App. pp. 20, 57.) Also among the contents in the well of the trash truck, Officer Gates found an envelope with the name Edward Krivda and the address 1901 Nolden, a handwritten letter with the name Frankie mentioned in it, and a three-by-five card with the names Rodger and Judy written on it. (App. pp. 20-21.)

After Officer Gates had examined the contents of the well of the trash truck, he went back to his former vantage point. There he observed respondent Rodger Minor come from the premises at 1901 Nolden and pick up the trash barrels which had contained the marijuana debris. Respondent Minor, wearing only a towel around his waist, took the trash barrels to the front porch of the house. (App. pp. 21-22, 81.)

At this point Officer Gates and his partner requested the assistance of a uniformed sergeant. The uniformed officer and Officer Gates approached the front of the premises while Officer Marsden positioned himself at the rear. When respondent Minor met Officer Gates at the front door, Officer Gates placed him under arrest for possession of marijuana. (App. pp.

22, 40, 43.) The officers then effected entry, discovered respondent Krivda in the residence, and recovered additional marijuana and paraphernalia. (App. pp. 23-25, 46.)

Summary of Argument

When the police examined the respondents' trash in the well of the trash truck parked a block away from respondents' home, the trash was abandoned property. The respondents' acts of (1) discarding the trash into their trash barrels and (2) then placing the trash barrels on the parkway for collection unambiguously demonstrated the requisite intent to abandon. It is well established that "There can be nothing unlawful in the Government's appropriation of abandoned property." *Abel v. United States,* 362 U.S. 217, 241 (1960).

Furthermore, the respondents had no "reasonable expectation of privacy" either as to the location of the search or as to the items seized from the trash. The well of a trash truck parked a block away from respondents' home is not within those areas immediately adjacent to the home which are protected by the Fourth Amendment. After the barrels were placed on the parkway, their contents were subject to numerous risks of public exposure. Respondents had also given the trash collector such complete and unrestricted control over their trash that they may be said to have accepted the risk that he might permit the police to examine the contents of their trash barrels. The Fourth Amendment does not protect ". . . a wrongdoer's misplaced belief that a person to whom he confides his wrongdoing will not reveal it." *Hoffa v. United States,* 385 U.S. 293, 302 (1966). There is no indication that society generally expects garbage to remain pri-

vate after it has come to rest in the well of a trash truck. To extend Fourth Amendment protection to the trash abandoned by respondents would elevate the trash barrel to the status of a constitutional sanctuary for the concealment and disposal of evidence of crime.

Apart from the question of whether the Fourth Amendment protects a right of privacy in one's trash, this case raises the issue of whether the exclusionary rule should have any application to the type of police conduct involved here. The law at the time of the search clearly permitted the appropriation of abandoned property. The exclusionary rule should not be used to discipline police officers who have attempted to act within the constitutional limits of the Fourth Amendment. The entire deterrent rationale of the exclusionary rule is open to serious question which may require its abandonment. Short of a complete reconsideration of the wisdom of retaining the exclusionary rule, petitioner proposes that the rule be limited to flagrant violations of the Fourth Amendment where the conduct of the police is truly lawless.

ARGUMENT

I

After the Contents of Respondents' Trash Barrels Had Been Deposited in the Well of the Trash Truck, the Discovery and Seizure of the Discarded Contraband Did Not Violate the Fourth Amendment Rights of Respondents

In sustaining the trial court's suppression of evidence in this case, the California Supreme Court held that the conduct of the police officers in examining respondents' trash after it had been transferred from the barrels on the curb to the well of the trash truck contravened the Fourth Amendment's prohibition against unreasonable searches and seizures. The court rejected petitioner's argument that trash, as abandoned property, was not within the scope of Fourth Amendment protection. *People v. Krivda,* 5 Cal. 3d 357, 365-66, 96 Cal. Rptr. 62, 68, 486 P.2d 1262, 1268 (1971). Instead, the court rested its decision on the premise that respondents Krivda and Minor ". . . had a reasonable expectation that their trash would not be rummaged through and picked over by police officers without a search warrant." *People v. Krivda,* 5 Cal. 3d at 367, 96 Cal. Rptr. at 68, 468 P.2d at 1268. This conclusion departs from established constitutional principles governing the appropriation of abandoned property and represents an unjustified extension of the privacy interests protected by the Fourth Amendment.

A. No Issue of Search and Seizure Cognizable Under the Fourth Amendment Arises From Police Examination of Abandoned Trash

There have been only two prior occasions when this Court has examined the concept of abandoned property in relation to the law of search and seizure. In both instances, this Court concluded that the exclusionary proscriptions of the Fourth Amendment were inapplicable to the seizure of the items found to have been abandoned by a criminal defendant.

The first case in which this Court dealt with abandoned property in the context of search and seizure was *Hester v. United States,* 265 U.S. 57 (1924). In that case, this Court held that revenue officers had properly retrieved several containers of illegally distilled whiskey which they had seen petitioner and one Henderson discard in an open field as they were attempting to flee from the federal officers. Writing for the Court, Mr. Justice Holmes, in disposing of the claim of illegal search and seizure, stated:

> "The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. . . ." *Hester v. United States, supra,* 265 U.S. at 58.

Mr. Justice Holmes then went on to hold that the protection given to " 'persons, houses, papers, and effects,' did not extend to the open fields." *Id.* at 59. Although the "open fields" doctrine was tendered as an alternative basis for the Court's decision in *Hester*, that decision was the origin of the principle that no seizure in Fourth Amendment terms resulted from the recovery of abandoned property by government agents.

Subsequently, in *Abel v. United States*, 362 U.S. 217 (1960), this Court relied upon *Hester* as having firmly established that principle in the law of search and seizure. The issue of abandoned property in *Abel* arose out of the search of the petitioner's hotel room immediately after he had paid his bill and had vacated the room. An F.B.I. agent, who conducted the search of the hotel room, found a hollowed-out pencil and a wooden block containing a "cipher pad" in a wastepaper basket. These items were subsequently used as evidence at petitioner's trial for conspiracy to commit espionage. With respect to the seizure of these items, Mr. Justice Frankfurter wrote for the Court:

> "Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property. See Hester v. United States, 265 U.S. 57, 58. . . ." *Id.* at 241.

Hester and *Abel* thus established the guiding principle that one's personal right to Fourth Amendment protection of property against unreasonable search and

seizure is lost when that property is abandoned. *See United States v. Edwards,* 441 F.2d 749, 752 (5th Cir. 1971). The owner of personal property brings his right of privacy to an end by abandoning the property. *Corngold v. United States,* 367 F.2d 1, 7 (9th Cir. 1966). When property has been abandoned, there is no issue of search and seizure within the meaning ascribed to those terms in the context of the Fourth Amendment. *Burton v. United States,* 272 F.2d 473, 476-77 (9th Cir. 1959), *cert. denied,* 362 U.S. 951 (1960); *Jackson v. State,* 235 So.2d 382, 385 (Ala. Crim. App. 1970); *People v. Lopez,* 22 App. Div. 2d 813, 254 N.Y.S. 2d 806 (1964). *See also Caldwell v. United States,* 338 F.2d 385, 388 (9th Cir. 1964), *cert. denied,* 380 U.S. 984 (1965). Thus, the inspection or examination of abandoned property by police officers is not a search, and the appropriation of such property may be effected without probable cause. *See* Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis,* 20 Buff. L. Rev. 399, 401 (1971).

In analyzing whether the trash discarded by respondents was abandoned property not subject to Fourth Amendment protection, it is instructive to examine the concept of abandonment as it has been developed in the law of property. At the outset, one is cautioned that "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. . . ." *Silverman v. United States,* 365 U.S. 505, 511 (1961). The principal object of the Fourth Amendment is the protection of privacy rather than property, and this Court has increasingly discarded fictional and procedural barriers resting on property concepts. *Warden v. Hayden,* 387

U.S. 294, 304 (1967). Property law concepts, however, are not wholly irrelevant to an analysis of the scope of constitutional protection afforded by the Fourth Amendment. For example, a defendant's standing to challenge an allegedly unlawful search or seizure requires, as a minimum, that there be some nexus between the particular intrusion and the privacy interests of the person raising the claim. *See Alderman v. United States*, 394 U.S. 165, 171-75 (1969). Although the capacity to claim Fourth Amendment protection does not depend upon a property right in a place subjected to governmental intrusion, *Mancusi v. De Forte*, 392 U.S. 364, 368 (1968), this Court has never held that a defendant may object to the seizure absent some connection between the defendant and the items seized at some point in time. One commentator has explained the relationship of property concepts to the Fourth Amendment treatment of abandoned property problems in this way:

> "When the issue of abandonment is raised in a criminal proceeding, the initial point of inquiry for a court should be directed toward the concept that has evolved with the development of property law. Although this concept is not controlling on the issue of abandonment in the law of search and seizure, it is a point of reference because it defines the property aspect of the issue. From this, a court should then proceed to the remaining, and critical, constitutional aspect, which determines whether the individual's activities had the effect of intentional and voluntary termination of his right of privacy in the property discarded. Thus, the issue of abandonment under the fourth amendment is composed of the dual qualities of property and privacy." Mascolo, *supra*, 20 Buff. L. Rev. at 401.

The New York Court of Appeals has formulated the test of abandonment, as a property law concept, in the following terms:

> ". . . . The abandonment of property is the relinquishing of all title, possession, or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of throwing away. . . ." *Foulke v. New York Consol. R. Co.*, 228 N.Y. 267, 273, 127 N.E. 237, 238 (1920).

Abandonment has also been defined as "the relinquishment of a right or of property with the intention of not reclaiming it or reassuming its ownership or enjoyment." *Ellis v. Brown*, 177 F.2d 677, 679 (6th Cir. 1949).

Abandonment has been held to be largely a question of intent which, in turn, is a question of fact. *United States v. Minker*, 312 F.2d 632, 634 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963). An intention to abandon may not be inferred "if the conduct of the owner can be explained consistently with a continued claim." *Linscomb v. Goodyear Tire & Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952). Although abandonment will not be presumed, the intent of one in possession of property often cannot be directly shown but must be inferred from his actions. *See United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970). Abandonment does not require performance of any particular ritual, and it may be inferred from an unambiguous act of intentional discard. *See United States v. Cowen*, 396 F.2d 83, 87 (2d Cir. 1968).[4]

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[4]Less proof may be required to establish an abandonment in the context of Fourth Amendment protections than would be re-

(This footnote is continued on next page)

Under these rules, the respondents' act of discarding contraband into their trash barrels was an act from which one may reasonably infer an intent to abandon. This conduct was inconsistent with any continued claim over the items placed in the trash can. The only reasonable conclusion inferable from the fact that items have been placed in a wastepaper basket or a trash can is that they have been thrown away and hence abandoned.

This Court's opinion in *Abel v. United States, supra,* implicitly recognizes the validity of drawing an inference of abandonment from a defendant's act of depositing items in a wastepaper basket. The weight of authority clearly favors that conclusion irrespective of whether the trash receptacle happens to be a wastepaper basket or a garbage can. *United States v. Dzialak,* 441 F.2d 212, 215 (2d Cir. 1971) (seizure of items from trash left between sidewalk and street in front of appellant's home); *United States v. Stroble,* 431 F.2d 1273, 1276 (6th Cir. 1970) (items seized were lying by the side of two garbage cans adjacent to curb and were observed by a police officer while he was still on public street); *United States v. Minker, supra,* 312 F.2d at 634-35 (government agents arranged with trash collector to permit them to examine contents of trash receptacle located outside appellant's apartment building and used by other tenants); *State v. Purvis,* 249 Ore. 404, 410, 438 P.2d 1002, 1005

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quired to establish an abandonment in ordinary civil litigation. For example, the fact that the owner of an automobile locks and leaves his car will not ordinarily be inconsistent with a continued claim of possession. Yet if a suspect fleeing the police leaves his car in the path of flight and runs away on foot, his car is deemed abandoned so as to permit a search of its interior absent either a warrant or probable cause. *See United States v. Edwards, supra,* 441 F.2d at 753.

(1968) (police examined items removed by maid in usual course of cleaning a hotel room). Other cases reach the same result by holding that a defendant has no reasonable expectation of privacy in garbage deposited in a public receptacle or turned over to the trash collector. *United States v. Jackson*, 448 F.2d 963, 971 (9th Cir. 1971) (seizure of items of evidence from a public trash can outside of defendants' motel room); *Croker v. State*, 477 P.2d 122, 125 (Wyo. 1970) (police examined contents of garbage collector's barrel after defendant's garbage had been removed from his garbage cans).[5] *Cf. Marullo v. United States*, 328 F.2d 361, 363 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964) (motel occupant had no right of privacy as to stolen money orders removed from top of brick pillar supporting the motel cabin).

Apart from the decision of the court below in this case, there appear to be only two cases which have rejected an inference of abandonment from the act of depositing articles in a trash can. The first of these cases was *Work v. United States*, 243 F.2d 660, 662-63 (D.C. Cir. 1957), in which then Circuit Judge Burger dissented. In *Work* police officers removed a phial of narcotics from a trash can located in an area under the front porch of the defendant's house. Upon coming to the defendant's house, the officers had observed her walk to the trash can and make motions

[5]It should be observed that the decision of the Wyoming Supreme Court in *Croker v. State, supra*, is factually identical to the present case in that the defendant's trash had been removed from the defendant's own garbage can by the trash collectors when the police conducted their examination of the refuse discarded. In *United States v. Minker, supra*, the opinion indicates that government agents arranged to have the trash collector permit them to examine the contents of a trash receptacle, but it is not clear where that examination took place.

as if putting something into it. The Court of Appeals held that the articles seized were not abandoned so as to lose the protection of the home provided by the Fourth Amendment. The court stated:

> ". . . . The trash receptacle in which the phial was found was in close proximity to the house. It was an adjunct to the domestic use of the home by appellant. It was within the curtilage or 'general enclosure surrounding the dwelling.' " *Work v. United States, supra,* 243 F.2d at 662 (citations omitted).

The Court of Appeals found to be immaterial the fact that the receptacle might have been partially visible from the street. It further held that the placing of the phial in the trash receptacle was not to be construed " 'as an abandonment of the phial unless to persons impliedly or expressly authorized to remove the receptacle's contents, such as the trashmen, for purposes of destruction. . . .' " *Id.* at 663.

The second case rejecting an inference of abandonment as to the contents of trash can is a prior decision by the same court that decided the instant case below. *People v. Edwards,* 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969). In *Edwards,* the California Supreme Court adopted the reasoning of *Work v. United States, supra,* and held that the placement of marijuana in a trash can located within a few feet within the back door of defendants' home was not an abandonment unless as to persons, such as trashmen, authorized to remove the receptacle's contents.

Both *Work* and *Edwards* are distinguishable from the instant case. Both cases involved trash receptacles located adjacent to a defendant's home. In *Work,* the Court of Appeals apparently inferred from the circum-

stances of that case that the defendant had merely intended to hide the narcotics in the trash can, an intent consistent with a continued claim of possession and inconsistent with an intent to abandon. *See Work v. United States,* 243 F.2d at 663. The circumstances of the *Edwards* case are similarly susceptible of the same inference.

In contrast, the facts of the present case will not support any inference of continuing possessory rights. The respondents' conduct manifested an unequivocal intent to relinquish all further rights over the contents of their trash cans. Even if the act of depositing the contraband in the trash barrels were insufficient by itself to prove an abandonment, the further act of placing the barrels on the parkway for collection established the intent to abandon beyond question.

Work and *Edwards* are also distinguishable on the ground that the trash cans were situated in very close proximity to defendants' houses. Even if the contents of the trash can in these two cases had been found to have been abandoned, the location of the trash receptacles may have brought them within the constitutional protection accorded to open areas immediately adjacent to a house. At common law, these areas were denominated by the term "curtilage." In *Care v. United States,* 231 F.2d 22, 25 (10th Cir.), *cert. denied,* 351 U.S. 932 (1956), the concept of the "curtilage" was defined as follows:

> ". . . Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."

While both *Work* and *Edwards* are explainable in terms of the protection accorded to areas immediately adjacent to a house, the instant case involved activity that was obviously beyond the furthest extension of the curtilage surrounding the respondents' home. The examination of trash located in the well of the trash truck parked on a public street at least a block away from the respondents' home could hardly be considered an intrusion into an area immediately adjacent to the house whose use and enjoyment was an adjunct to the domestic economy of respondents Krivda and Minor. Indeed, if the respondents had been arrested at the location where the police officers inspected the trash, the defendants' house would have been beyond the immediate vicinity of the arrest for purposes of an incidental search of that house. *See Vale v. Louisiana,* 399 U.S. 30, 34-35 (1970).

Based upon the foregoing analysis, petitioner submits that the inspection and appropriation of the contraband found in respondents' trash was wholly outside the protective ambit of the Fourth Amendment. Under the facts of this case, the only reasonable inference to be drawn from the respondents having deposited the contraband in the trash barrels and then having placed the trash barrels on the curb is that they intended to relinquish all further claim over the items therein. Such an inference is the essence of abandonment. The only point remaining for discussion is whether this Court's shift of emphasis from constitutionally protected areas to reasonable expectations of privacy requires a different result than that reached under the earlier constitutional approach. The next section of this argument will demonstrate that the change in approach should not require a change in result.

B. Respondents Have No Reasonable Expectation of Privacy With Respect to Their Abandoned Trash

Prior to *Katz v. United States,* 389 U.S. 347 (1967), the search and seizure decisions of this Court tended to focus on whether the location searched was a "constitutionally protected area." *See e.g., Berger v. New York,* 388 U.S. 41, 57, 59 (1967); *Lopez v. United States,* 373 U.S. 427, 438-39 (1963); *Silverman v. United States,* 365 U.S. 505, 510, 512 (1961). In *Katz,* the Court eschewed this phrase as a mode of analysis, stating that ". . . the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" 389 U.S. at 350. The Court explained that the term was only descriptive of a conclusion and was not meant to serve as a "talismanic solution to every Fourth Amendment problem." *Id.* at 351 n. 9. Mr. Justice Stewart's opinion for the Court further states:

> "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

Rejecting the traditional formulation of the Fourth Amendment, the Court found that the government's electronic eavesdropping activities had violated the privacy upon which the petitioner had justifiably relied while using a telephone booth. *Id.* The *Katz* opinion did not elaborate on the concept of "justifiable reliance," except to state that ". . . what [a person] seeks to preserve as private, even in an area

accessible to the public, may be constitutionally protected." *Id.* at 351-52.

The concurring opinion of Mr. Justice Harlan has served as a gloss to explain what the Court intended by its reformulation in *Katz* of the approach to search and seizure questions arising under the Fourth Amendment. In Justice Harlan's view, these questions were to be resolved in terms of the individual's "reasonable expectation of privacy." *Id.* at 360. His concurring opinion explains this phrase in these terms:

> ". . . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. (Citation omitted.)" *Id.* at 361.

Justice Harlan's test directed towards "reasonable expectations of privacy" has since been adopted by the majority of the Court in several subsequent decisions. *Terry v. Ohio,* 392 U.S. 1, 9 (1968); *Alderman v. United States, supra,* 394 U.S. at 179 n.11. Other decisions after *Katz* have contained variations on the same theme. *Mancusi v. De Forte, supra,* 392 U.S. at

368 ("reasonable expectation of freedom from governmental intrusion"); *United States v. White*, 401 U.S. 745, 752 (1971) ("what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant").

Although this Court's emphasis has shifted from places to persons, that change of outlook should not compel a difference of result in cases involving the government's seizure of abandoned property for use as evidence in criminal cases. A reanalysis of these decisions in terms of the individual's "reasonable expectation of privacy" should demonstrate the owner's right of privacy ends at the point he abandons his property to the waste basket or the trash barrel.

At the outset, a person claiming Fourth Amendment protection must be found to have an actual, subjective expectation of privacy in the area searched or the thing seized. An evaluation of subjective expectations will serve to exclude from further analysis those cases where the defendant has voluntarily relinquished control over items of evidence which prove to be incriminatory upon discovery by the police. The rationale for withdrawing Fourth Amendment protection from this class of cases is that the courts should not assign any greater importance to discarded articles than their previous owner attached to their possession. If he really wanted his privacy interests to be protected, all he had to do was safeguard their possession within an area demonstrably intended to be private. In default of such precautions, he should be held to the dictum in *Katz* that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

From the preceding discussion, it is readily apparent that the instant case is subject to exclusion from the scope of Fourth Amendment protection because the circumstances of this case raise no supportable inference of the respondents' having a subjective expectation of privacy either in the place searched or in the items seized. Yet even if this case were not screened out at this initial stage, the respondents' pretensions to a subjective expectation of privacy would not be recognized as reasonable by society. *See Katz v. United States, supra,* 389 U.S. at 361 (Mr. Justice Harlan concurring). Only when the purported victim of an illegal search or seizure has a "reasonable expectation of privacy" in the place searched or the items seized can he be said to have "justifiably relied" on privacy interests protected by the Fourth Amendment. *See id.* at 353. The loosely defined reliance standard in the *Katz* decision provides little in the way of guidelines for determining when an individual's expectations of privacy are reasonable in the constitutional sense. As with other areas in the law of search and seizure, each case must be judged on its own particular facts in determining the reasonableness of one's expectation of privacy. *See Wong Sun v. United States,* 371 U.S. 471, 479 (1963).

The student authors of an article written shortly after the *Katz* decision have suggested that three factors should be considered in determining whether persons claiming Fourth Amendment protection have a reasonable expectation of privacy warranting such protection. The three factors are (1) the nature of the intended area of private control, (2) the defendant's right to exclusive use of that area or facility, and (3) the degree to which society honors the intimacy or

privacy of the activity normally carried on in such a place. *See* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. Rev. 968, 983-84 (1968). By use of these three tests, the authors of the note argue that the privacy due an individual in a given place can be evaluated without relying on property concepts. *Id.* at 984.

The first factor, the nature of the intended area of private control, is a logical point of departure. Although we are now admonished that the Fourth Amendment protects people, not places, Mr. Justice Harlan noted in his concurring opinion that:

> ". . . . The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" *Katz v. United States, supra,* 389 U.S. at 361.

Apparently elaborating upon Justice Harlan's observation, the authors of the New York University note added this perspective:

> ". . . . The degree of privacy offered by structural characteristics, such as partitions or walls, is an important determinant of an area's character. While it might be argued that walls and windows should be weighed only as factors affecting the reasonableness of the expectation of privacy and not given additional emphasis, it is submitted that an enclosed area exhibits to the world a clear demarcation between inside and outside, private and public, and, in so doing, visibly asserts the right to have this boundary respected. . . ." Note, *supra,* 43 N.Y.U. L. Rev. at 983-84.

In applying this analysis to the present case, it is clear that the respondents erected no visible boundary demarcating the privacy interests which they would have this Court protect. In this case, the intended area of private control is the well of the trash truck parked a block away from the respondents' home. The respondents cannot seriously maintain that they had a reasonable expectation of privacy with respect to the locus of the search. The respondents' trash left the area of private control over which they had a reasonable expectation of privacy as soon as it left the areas immediately adjacent to their house within which constitutional protection was accorded. *See Care v. United States, supra,* 231 F.2d at 25. Once the abandoned trash was placed on the public parkway, it was no longer within a protected area of private control. After it had been emptied into the well of the trash truck, all possible claims of private control over the locus of the search clearly had been dissipated. Since the search of the contents of the trash cans took place in the well of a trash truck parked on a public street, the respondents lacked any connection, by property interest or otherwise, which gave them a justifiable basis for an expectation of privacy in the area searched.

A second consideration of importance in the privacy interest approach to Fourth Amendment protection is whether the claimant had a right to exclusive use of the area searched or the things seized. The more an individual exposes his personal affairs to others, the less likelihood there is of constitutional protection. To reiterate familiar language, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States, supra,* 389 U.S. at 351. Thus,

an index of the Amendment's protection of individual privacy is the degree of risk of intrusion by other persons including governmental agents.

In the instant case, the trash discarded by the respondents was subject to the risk of exposure from the moment the trash barrels were placed on the parkway for collection. Nosy neighbors or curious passersby might easily examine the contents of the garbage cans. There was an ever-present danger that domestic animals, such as dogs and cats, might upset the trash containers and expose their contents to public view. The trash collector himself was also free to examine the trash before emptying it into the well of his truck. If he were the least bit clumsy, there was the possibility that he might spill a portion of the contents on the roadway in front of the respondents' house. When and if the contents of the trash barrels reached the dump, they would hardly have been private there. Trash deposited at a dump may be picked over by scavengers and is exposed to other members of the public who bring their trash directly to the dump. In these days of heightened interest in ecology, one cannot fully anticipate how many persons may actually pour over the contents of a householder's trash barrels in quest for recyclable materials. The opinion of the court below concedes:

> "Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. . . ." *People v. Krivda, supra,* 5 Cal. 3d at 367, 96 Cal. Rptr. at 69, 486 P.2d at 1269.

Thus, an expectation of privacy as to one's discarded trash is hardly reasonable. In this context, privacy is at best a faint hope. For this reason, the respondents should not be permitted to cry "Foul" when police officers conduct an examination the risk of which respondents accepted from other members of the public.

The California Supreme Court concluded that an abandonment of one's trash to the trash collector was not ". . . necessarily an abandonment of one's trash to the police or general public." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Unfortunately, the California Supreme Court cites no authority for the novel doctrine of partial abandonment. Like pregnancy, abandonment by definition cannot be partial. Either one has voluntarily relinquished all of his property interest in discarded items, or he has not.

Even if one were to assume that an abandonment of trash to the trash collector was not an abandonment to the public at large or to the police, it is clear that there are circumstances when an owner may give another such complete and unrestricted freedom over his property that he will have accepted the risk that the person so entrusted would consent to a search, thus losing his right to privacy. *See United States v. Edwards, supra,* 441 F.2d at 752 and cases cited. The case of *Clarke v. Neil,* 427 F.2d 1322 (6th Cir. 1970) is an apt illustration of this point. In *Clarke,* the manager of a dry cleaning establishment let the police conduct a laboratory examination of a suit delivered to him by the defendant for cleaning. The laboratory examination revealed the presence on the suit of certain fibers matching those in the murder victim's clothing.

The Court of Appeals for the Sixth Circuit held that the evidence from the laboratory examination was admissible because the court was unable to find any significant invasion of anything which appellant had sought to preserve as private. The court noted that appellant had delivered the suit to the cleaners open to public view, that he knew the suit could be handled and examined by many persons in the course of the cleaning process, but that he in no way tried to conceal the suit or anything contained thereon, nor did he try to restrict the number of persons who handled it. 427 F.2d at 1325.

The same reasoning should apply with even more force in the instant case. For here the respondents retained no property interests in the trash examined by the police whereas the defendant in *Clarke v. Neil* still retained the rights of a bailor under implied bailment. The rule adopted by the court below could only serve to deprive the police of information and evidence provided by citizens, such as the dry cleaner in *Clarke* and the garbage men in this case, who have come to the aid of law enforcement. It is well recognized that the effective enforcement of our criminal law depends in large part on the voluntary cooperation of public spirited citizens. *See, e.g.*, Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 99 (1967).

The decisions of this Court support the reasoning of the Sixth Circuit in *Clarke*. In *Hoffa v. United States*, 385 U.S. 293, 302 (1966), this Court held that the Fourth Amendment does not protect ". . . a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal

it." Subsequently in *United States v. White*, 401 U.S. 745, 752 (1971), this Court further observed:

> "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. . . ."

It is hardly a meaningful distinction that the respondents in this case confided the evidence of their wrongdoing to a garbage collector instead of a police informant or turncoat accomplice. Under the circumstances of this case, the respondents assumed the risk that the garbage collectors might permit the police to examine their trash upon request.

The third criterion of protectible privacy interests under the Fourth Amendment is "the degree to which society honors the intimacy or privacy of the activity normally carried on in such a place." (Footnote omitted.) Note, *supra*, 43 N.Y.U. L. Rev. at 984. Since virtually every governmental action interferes with personal privacy to some degree, the question in each case is whether that interference violates a command of the United States Constitution. *Katz v. United States supra*, 389 U.S. 350 n. 5. For this reason, it is necessary that ". . . an individual's otherwise reasonable expectation of privacy be buttressed by social norms; the intended walls of privacy must have some objective validity." Note, *supra*, 43 N.Y.U. L. Rev. at 984.

There are several indications that society attaches no special character of intimacy to trash deposited on the curb for collection. It is common knowledge that the

major credit card companies advise their cardholders to mutilate their expired credit cards before discarding them as trash. The obvious reason for such warnings is that one's trash can is not secure from the depredations of criminals who might later alter and use such cards. Similarly the average citizen is at the mercy of potential forgers when he deposits cancelled checks bearing specimen signatures into his garbage cans. Furthermore, it is doubtful that few, if any, persons harbor subjective expectations of privacy with respect to their garbage. As Chief Justice Burger observed while on the United States Court of Appeals for the District of Columbia Circuit:

> "Honest citizens neither need nor, I think, want protection for their privacy extended to these artificial limits, and a presently confessed, previously convicted narcotics violator is not entitled to it. Of course the guilty should have the same protective safeguards as the innocent and I would afford them as much. But I refuse to join in what I consider an unfortunate trend of judicial decisions in this field which strain and stretch to give the guilty, not the same, but vastly more protection than the law-abiding citizen. . . ." *Work v. United States, supra,* 243 F.2d at 665 (dissenting opinion). (Footnote omitted.)

The extension of Fourth Amendment protection to the trash abandoned by the respondents in this case would be tantamount to making the garbage receptacle an inviolate sanctuary for the concealment and disposal of evidence of crime. The court below relied on *People v. Edwards, supra,* 71 Cal. 2d at 1104, 80 Cal. Rptr. at 738, 458 P.2d at 718, in holding that the privacy interests protected by the Fourth Amend-

ment did not terminate ". . . at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. . . ." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Thus, the California Supreme Court creates a new right to have one's trash commingled with the trash of others under the guise of interpreting the Fourth Amendment. If that right is upheld by this Court, a new means will have been fashioned by which criminals may avoid detection simply by depositing the instrumentalities and evidence of crime in a wastepaper basket or garbage can. The net effect of the decision will be to remove the crucial link in the chain of evidence connecting the defendant with the corpus of the crime. While the Fourth Amendment is intended to protect a person's papers and effects from unreasonable searches and seizures by government agents, it has never been construed as protecting those papers and effects after they have ceased to be the property of the defendant.

In summary, the respondents' own acts of abandonment negate any subjective expectation of privacy under the circumstances of this case. The intended area of private control was the well of a trash truck on a public street, far beyond the open areas immediately adjacent to respondents' house which were entitled to constitutional protection. The respondents' rights with respect to their abandoned trash were nonexclusive. And lastly, it cannot be said that society honors the intimacy or privacy of one's garbage after it has come to rest in the well of a trash truck. These reasons all support the ultimate conclusion that one has no constitutionally justifiable expectation of privacy in the items he abandons to the trash barrel placed on the curb.

II

The Exclusionary Rule Should Not Be Applied Under the Circumstances of the Present Case

Apart from the narrow question of whether the Fourth Amendment protects a right of privacy in one's trash, the circumstances under which this case arose present a more significant issue for decision by this Court. That issue is whether the exclusionary rule should have any application at all to the type of police conduct involved in this case. Here the police had apparent justification for their belief that an examination of respondents' trash in the well of the trash truck was not an unreasonable search. No less authority than this Court had held that there was nothing unlawful in the government's appropriation of abandoned property. *Abel v. United States, supra,* 362 U.S. at 241. Thus, an application of the exclusionary rule here would only serve to penalize the police officers for their good-faith reliance on what appeared to be settled law. Such a penalty is hardly consistent with the often expressed dictum that the exclusionary rule ". . . is calculated to prevent, not to repair." *Elkins v. United States,* 364 U.S. 206, 217 (1960).

The manner in which this case arose provides a vivid illustration of the uncertainty which confronts the average police officer seeking an answer to the everyday question of whether he has probable cause to arrest or search. The trial court first ruled that the evidence challenged in this case was admissible. (App. p. 6.) After permitting respondents to reopen their motion to suppress, the trial court reversed its previous ruling based upon the same evidence and arguments previously presented. (App. p. 7.) Thereafter all three judges of the California Court of Appeal held the chal-

lenged evidence to be admissible. That decision was overturned when the California Supreme Court granted a hearing and ruled, four to three, that the evidence was inadmissible. (App. A & C, Pet. for Cert.) It can scarcely be said that this monumental state of confusion was the result contemplated when the exclusionary rule was devised. It is therefore imperative that the rule be re-examined in an attempt to eliminate the intolerable state of uncertainty which faces every law enforcement officer performing his day-to-day duties in the field.

A. The Exclusionary Rule Has Proved Ineffective as a Safeguard of Fourth Amendment Rights While Diverting Critical Resources From the Major Goals of the Criminal Process

The principal function of the exclusionary rule in the field of search and seizure has been explained by this Court on numerous occasions. In *Elkins v. United States, supra,* at 217, the Court stated:

> "The purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

When this Court applied the exclusionary rule to the States in *Mapp v. Ohio,* 367 U.S. 643 (1961), the *Elkins* statement was quoted with approval in setting forth the purpose of the rule as commanded by the due process requirements of the Fourteenth Amendment. *Id.* at 656. Subsequently in *Linkletter v. Walker,* 381 U.S. 618, 637 (1965), the Court reiterated that "the purpose [of the *Mapp* decision] was to deter the lawless action of the police."

There has been growing skepticism as to whether the exclusionary rule has more than a minimal effect

in deterring unlawful searches and seizures. The most thorough study of this issue to date concluded:

> ". . . . The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. . . ." Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 709 (1970).

There are, however, strong indications that the deterrent effect of the exclusionary rule is limited to a narrow range of cases. First of all, the rule is structured so that it applies only when the fruits of an unlawful search are introduced at a criminal trial. When an unlawful search fails to reveal evidence of crime, the victim of that search is not protected by the exclusionary rule. Any deterrent effect as to this class of cases depends solely upon the individual policeman's respect for the Constitution. In those cases where the protections of the Fourth Amendment have been applied to invalidate administrative searches, the exclusionary rule has not come into play. *See Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967). Hence these cases do not dilute the force of Chief Justice Warren's observation in *Terry v. Ohio,* 392 U.S. 1, 14 (1968), that:

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." (Footnote omitted.)

In those instances where the police are motivated by goals other than obtaining convictions, the exclusionary rule cannot claim any truly deterrent effect. Examples of such objections are found in the enforcement of liquor, gambling and narcotics laws where confiscation of contraband is at least as important as securing the offender's conviction. In these types of cases, this Court has not removed the incentive for potentially unlawful searches or seizures because the confiscation is upheld regardless of whether the defendant is convicted. As this Court has held on more than one occasion, the suppression of evidence does not in itself entitle the aggrieved person to the return of contraband. *Warden v. Hayden,* 387 U.S. 294, 307-08 (1967); *Trupiano v. United States,* 334 U.S. 699, 710 (1948).

Secondly, the deterrent effect that may exist appears to be without real force. It does not operate directly as a sanction on the police officers involved and its educational value is diminished by the great time lag between the challenged search and the ultimate decision of the highest court to review the case. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 416-18 (1971) (dissenting opinion of Mr. Chief Justice Burger).

The trenchant criticisms of the exclusionary rule are well known to this Court. As Mr. Justice Jackson observed in *Irvine v. California,* 347 U.S. 128, 135-37 (1954):

> "What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure

by federal officers. The rule was announced in 1914 in *Weeks v. United States*, 232 U.S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this Court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it. . . . That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." (Footnote omitted.)

This Court must eventually consider whether the social cost of retaining the exclusionary rule outweighs the minimal protection afforded by this approach to enforcement of the Fourth Amendment. The tension created by the rule stems from the fact that it serves "neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal into their midst. . . ." 8 *Wigmore on Evidence* § 2184, pp. 51-52 (McNaughton ed. 1961).

Professor Oaks expressed similar concern in his 1970 study of the exclusionary rule:

"The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and in-

centive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one. . . ." Oaks, *supra*, 37 U. Chi. L. Rev. at 755.

Other commentators have also concluded that the essentials upon which the exclusionary rule depends have not been adequately achieved. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987, 1003 (1965).

In the field of constitutional adjudication, it has long been recognized that the policy considerations favoring the doctrine of *stare decisis* are less compelling than in other fields of law where "it is more important that the applicable rule of law be settled than that it be settled right." *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 410 (1932) (dissenting opinion of Mr. Justice Brandeis). When experience proves that a rule created by judges should never have been created at all, or that their rule, though originally sound, has become unsuited to new social conditions, a reconsideration of the old rule may reveal "the unwisdom of its expansion or imperatively require its revision or abandonment." *Francis v. Southern Pacific Co.*, 333

U.S. 445, 453 (1948). As Mr. Justice Douglas has written, "So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 737 (1949).

Since this Court held in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments, any alteration of the rule must come from this Court, rather than from Congress or any State legislature. It is, of course, open to serious question whether the exclusionary rule is constitutionally required as an inherent part of the Fourth Amendment's guarantee against unreasonable searches and seizures. In *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), the Court noted that the initial application of the exclusionary rule to the federal system "was not derived from the explicit requirements of the Fourth Amendment." Mr. Justice Black expanded on this view of the origin and requirements of the exclusionary rule with these words:

> "Had the framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminatory evidence in the Fifth Amendment. Since the Fourth Amendment contains no language forbidding the use of such evidence, I think there is no such constitutional rule. So I continue to believe that the exclusionary rule formulated to bar such evidence in the *Weeks* case is not rooted in the Fourth Amendment but rests on the 'supervisory power' of this

> Court over the other federal courts—the same judicial power involved in *McNabb v. United States*, 318 U.S. 332. . . ." *Berger v. New York*, 388 U.S. 41, 76 (1967) (dissenting opinion).

Mr. Justice Blackmun joined with Mr. Justice Black, concurring and dissenting in *Coolidge v. New Hampshire*, 403 U.S. 443, 497, 510, wherein it was said:

> "The *Weeks* opinion made no express confession of a break with the past. But if it was merely a proper reading of the Fourth Amendment, it seems strange that it took this Court nearly 125 years to discover the true meaning of those words. The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. . . ."

Against this backdrop, Mr. Chief Justice Burger wrote in his *Bivens* dissent that:

> "I do not propose, however, that we abandon the Suppression Doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. . . ." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, supra*, 403 U.S. at 420 (dissenting opinion).

Many alternatives to the exclusionary rule have been suggested, most of which would also have some deterrent effect upon Fourth Amendment violations. *See, e.g.*, Report of the Task Force on Law and Law Enforcement to the National Commission on the Causes and Prevention of Violence, *Law and Order Reconsidered*, pp. 365-409 (1969); Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 Sw.

U. L. Rev. 68 (1972); Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative*, 47 L.A. Bar Bull. 91 (1972). The absence of an effective alternative was one of the grounds of decision in *Mapp. v. Ohio, supra*, 367 U.S. at 652. It should be noted, however, that this Court's almost exclusive reliance upon the exclusionary rule as a means of preserving Fourth Amendment rights may constitute the principal obstacle to the development of effective alternatives. Professor Oaks study concluded:

> "The exclusionary rule cannot be replaced as long as it remains a constitutional requirement. However, there is no *legal* obstacle to *supplementing* the exclusionary rule, especially in areas where it is admittedly ineffective. The obstacle is a *practical* one. The enormous concentration and reliance upon the exclusionary rule may forestall the development of alternative mechanisms for controlling improper behavior by the police. By a peculiar form of federal preemption, the *Mapp* decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule. . . ." *Oaks, supra*, 37 U. Chi. L. Rev. at 753. (Emphasis in original; footnote omitted.)

While no one reasonably disagrees with the proposition that there should be some remedy for illegal searches and seizures violative of the Fourth Amendment, the real question "is whether suppression of the truth with consequent acquittal of the guilty is a fair and an effective measure to that end." *State v. Bisaccia*, 58 N.J. 589, 590, 279 A.2d 675, 677 (1971).

Even in the absence of a substitute remedy, it is difficult to comprehend the wisdom of retaining a rule which benefits only the guilty victim of an unlawful search. The absence of equal protection for the innocent victim is perhaps the best argument for an abandonment of the rule. The exclusionary rule should be abandoned, but if the inadequacies of the rule are not yet fully apparent, it should nonetheless be restricted to the level of critical tolerance suggested in the following analysis.

B. Application of the Exclusionary Rule Should Be Limited to Those Circumstances Which Gave Rise to the Need for Its Existence

The Fourth Amendment to the Constitution of the United States was ratified in 1791 against the "intellectual matrix" of the struggle between the Crown and the opposition press led by author and editor John Wilkes during the 1760s. *Marcus v. Search Warrant*, 367 U.S. 717, 728-29 (1961). An effective but abusive tool of the Crown had been use of general warrants. The words of the Fourth Amendment reflect the determination of the newly independent Americans to be free "from intrusion and seizure by officers acting under the unbridled authority of a general warrant," which was known as a writ of assistance and had given custom officials blanket authority to search where they pleased for goods imported in violation of British tax laws. *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

The exclusionary rule, or suppression doctrine, found expression by the United States Supreme Court in *Weeks v. United States*, 232 U.S. 383, 398 (1914). Purely as "a matter of judicial implication" to protect the "security of one's privacy against arbitrary intru-

sion by the police—which is at the core of the Fourth Amendment . . ." illegally seized evidence was held inadmissible in a federal criminal prosecution. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Citing this wording in the *Wolf* decision, the Supreme Court of the State of California applied the exclusionary rule to California prosecutions "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers." *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955). Relying heavily upon the rationale of this California decision, the United States Supreme Court in 1961 applied the exclusionary rule to state criminal prosecutions and closed "the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of" the right to privacy free from unreasonable state intrusion. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

From its inception the exclusionary rule "has had only a precarious tenure in this Court." *Mancusi v. DeForte*, 392 U.S. 364, 373 (1968) (Justices Stewart and Black dissenting). "[D]espite its impressive support from our highest courts, the rule's vitality has always been precarious due to the illogical situation which exists when a man's guilt or innocence is determined by the means used to obtain the evidence against him." Horowitz, *supra*, 47 L.A. Bar Bull. at 92. The impact that this intellectual paradox has upon the average citizen was described by Professor John Waite as causing a deprecation of group ideals which results in derogation of the potentiality that abstention from crime will be achieved through conformity with group idealism. Waite, *Judges and the Crime Burden*, 54 Mich. L. Rev. 169, 192-93 (1955). Judge

Shirley M. Hufstedler of the United States Court of Appeals for the Ninth Circuit has articulated the extent to which the exclusionary rule exacts a high price in terms of the respect for our institutions of justice.

> "The subtleties of that enforcement by indirection have almost wholly escaped the public and appear to have often deluded the Court itself. The message most widely received is that the Fourth Amendment is a shield solely for the guilty. It is a hard message to correct because the visible beneficiaries of the exclusionary rule are persons subjected to searches and seizures that have yielded evidence of crime. People subjected to illegal searches that turn up nothing do not appear in the criminal process. Illegal searches rarely surface in a civil proceeding because legislatures and courts have not created effective civil remedies.
>
> "Increasing public anxiety about crime, escalating attacks upon courts, and continuing dissatisfaction with results of the exclusionary rules have combined to impose great pressure to cut the rules to levels of critical tolerance." Hon. Shirley M. Hufstedler, "The Directions and Mis-Directions of a Constitutional Right of Privacy," Twenty-Eighth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, May 11, 1971, p. 20. (Footnotes omitted.)

Whether the negative effects of the exclusionary rule are unavoidable consequences of the pursuit to secure Fourth Amendment rights presents a serious question. This Court in *Mapp v. Ohio*, 367 U.S. 643,

657 (1961), held that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments. What due process requires, however, is not fixed adherence to standards of what has previously been deemed reasonable and right. Due process is a living principle which cannot be confined to what may at a given time be deemed the limits or the essentials of fundamental rights. *Wolf v. Colorado,* 338 U.S. 25, 27 (1948). " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." *Hannah v. Larche,* 363 U.S. 420, 442 (1960). The question, then, is whether the essentials of due process have at all been altered by the eleven-year evolution following the epic decision in *Mapp.*

In considering the interaction of due process and Fourth Amendment violations, it is well to remember the two basic aims suggested by Mr. Chief Justice Warren E. Burger in his article entitled, "Who Will Watch the Watchman?" 14 Am. U. L. Rev. 1, 10 (1964):

> "Perhaps we can all agree on two basic aims: first, that deterring official misconduct in law enforcement is a vital objective for society; and second, that society and the administration of justice are best served by vastly reducing, and if possible eliminating, the need to exclude relevant and probative evidence from a criminal trial whose very truth-seeking function is necessarily stultified to some degree by such exclusion. . . ."

At present the exclusionary rule fails in its principal objective of deterring official misconduct, and it thereby fails to protect the individual substantially

while at the same time it causes a disproportionate loss of protection for society. But the major emphasis is not one of contrasting interests between the individual and society, for the individual is society. What we are actually considering is contrasting interests of the individual in society. The right to privacy can be violated by the criminal as well as the police. This point was recognized by Chief Justice Weintraub of the New Jersey Supreme Court when he wrote:

> "The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. . . . The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus consecrated, but rather to say that those rights may not be read to defeat the very reason for government itself.
>
> "We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them." *State v. Bisaccia*, 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

It is a consideration of these contrasting interests of the individual which gives proper definition to the exclusionary rule. What must be sought is a reconciliation between the purpose of the rule and the pain of

suppression inflicted upon innocent victims by its persistent application.

The exclusionary rule was created to protect the privacy of the individual from certain specific conduct on the part of police officers. The conduct sought to be controlled in *Mapp* was described as "official lawlessness in flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment." *Mapp v. Ohio*, 367 U.S. 643, 655, 657, 658 (1961). The conduct in *Mapp* was precisely that. Three police officers arrived at Miss Mapp's residence pursuant to information that a person was hiding in the home who was wanted for questioning in connection with a recent bombing. The officers knocked on the door and demanded entrance, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Three hours and four additional officers later, the officers forcibly opened the door when Miss Mapp did not respond immediately. Although Miss Mapp's attorney arrived, he was not permitted to see her or enter the house. When Miss Mapp demanded to see a search warrant, a paper was held up by one of the officers which she grabbed and placed into her bosom. A struggle ensued in which the officers recovered the paper, handcuffed Miss Mapp because she had been belligerent, and twisted her hand, causing her to yell and plead with the officers.

This conduct is similar to that which occurred in other cases and engendered the following descriptions:

> "flagrant disregard of the procedure which Congress has commanded"—*McNabb v. United States*, 318 U.S. 332, 345 (1943).

"arbitrary intrusion"—*Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

"flagrantly, deliberately, and persistently violated the fundamental principles declared by the Fourth Amendment—*Irvine v. California*, 347 U.S. 128, 132 (1954).

"willful disobedience of a Constitution they are sworn to uphold"—*Elkins v. United States*, 364 U.S. 206, 223 (1960).

"arbitrary invasions by government officials"—*Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The words of these courts in describing the prohibited action fall into two categories: *first*, deliberate, willful, and utter disregard; *second*, flagrant, arbitrary, and unconscionable. Thus, the activity to be deterred by the exclusionary rule is that which deliberately or flagrantly violates Fourth Amendment rights. To deter this conduct the exclusionary rule should be applied only in case of deliberate or flagrant violation.

It is contrary to the philosophy of the exclusionary rule to apply it where the violation by the police officer is at most inadvertent. In order for the deterrence theory to have any validity, the police officer must be able to discern right from wrong. He must be able to perceive that conduct which he is to avoid. As was stated by Mr. Justice Traynor in delineating the exclusionary rule in *People v. Cahan, supra*, 44 Cal. 2d at 448, 282 P.2d at 913: "Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and *a choice* between securing evidence by legal rather than by illegal means, officers will be impelled to obey the laws themselves

since not to do so will jeopardize their objectives." (Emphasis added.) This will be true only where the police officer knows that he has a choice, that is, only where he knows that his proposed activity would be in violation of Fourth Amendment rights.

Application of the exclusionary rule must be tempered with the realization that a police officer is not as well equipped as an appellate court justice to deal with legal technicalities. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949). The police officer does not have the same education, training, or experience as that of an appellate court justice, nor is the police officer in a position to devote as much time to making a legal determination. Indeed, as to the disparity in education alone, a 1961 survey of over 300 police departments revealed that 24 percent of those departments had no minimum educational prerequisite, while less than one percent required any level of college preparation. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, p. 126 (1967).

Certainly it is illogical to require of a policeman a standard of performance which would be unconstitutionally void for vagueness if applied to the ordinary citizen because the standard required an intricate knowledge of the law and the expertise of a legal technician. As Judge Friendly has suggested, "It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be forced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court." Friendly, *The Bill of Rights as a*

Code of Criminal Procedure, 53 Calif. L. Rev. 929, 952 (1965).

It is clear that many authorities believe that the exclusionary rule cannot work where there is no "distinct rule consensus" in that a "nine man rule of reason almost seems destined for vagueness." Burns, *Mapp v. Ohio: An All-American Mistake,* 19 DePaul L. Rev. 80, 88 (1969). Professor Charles Alan Wright has criticized the complexity of the laws relating to search and seizure and noted that:

> "A police officer will not be deterred from an illegal search if he does not know that it is illegal. The law of search and seizure is hopelessly complicated and confused . . . It defies reality to think that the average police officer could hold all of that arcane learning in his head or that he could always apply it correctly when he is required to make quick decisions in the course of the difficult and often dangerous business of law enforcement." Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 Texas L. Rev. 736, 740-41 (1972).

The exclusionary rule has been successful in providing police officers with a basis of knowledge upon which they may make an educated determination that specific conduct is not a search or that the search is reasonable. The California Attorney General has prepared and distributed pamphlets designed to inform police officers of the laws relating to search and seizure. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L. Rev. 565, 587-88 (1955).

In applying this basic knowledge to a determination of probable cause, the police officer must determine whether there is more evidence for than against, supported by evidence which inclines the mind to believe but which leaves some room for doubt. *People v. Ingle,* 53 Cal. 2d 407, 412-13, 2 Cal. Rptr. 14, 17, 348 P.2d 577, 580 (1960); *see also, Berger v. New York,* 388 U.S. 41, 59 (1967). It has been noted by this Court that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California,* 401 U.S. 797, 804 (1971). Therefore, when it appears to the police officer that it is sufficiently probable that the action he intends to take does not violate Fourth Amendment rights, the exclusionary rule should not be applied. There is no deliberate or flagrant violation of Fourth Amendment rights to deter, and it is contrary to the spirit of the common law to apply a rule to a situation in which the reason for the rule does not exist. *Crandall v. Woods,* 8 Cal. 136, 143 (1857).

Of central importance in developing the criteria with which to determine whether a violation is deliberate or flagrant is the ease with which a police officer may apply these standards to his conduct. An elaborate and intricate system of rules can do little but confuse an already perplexed police officer. Therefore police conduct should be measured by considering whether:

1. The conduct has clearly been proscribed by a settled rule;

2. When the conduct is not covered by a settled rule, it should appear to a reasonable officer in like circumstances that the rationale of existing rules would prohibit the particular conduct;

3. The time in which the officer was reasonably required to act permitted the officer adequately to reflect upon the propriety of the proposed conduct.[6]

Application of this test to the facts of the present case demonstrates that the action taken by Officers Gates and Marsden in examining respondents' trash in the well of the truck did not constitute a deliberate or flagrant violation of Fourth Amendment rights. As shown in Argument I, *supra,* no settled rule proscribed the action they took, and it would not appear to a reasonable officer in like circumstances that the rationale of existing rules would prohibit their conduct. Three justices of the Court of Appeal and three justices of the California Supreme Court have so held. (App. A and C, Pet. for Cert.)

Therefore, it must be said that the action taken by Officers Gates and Marsden was reasonable to a sufficient probability and was not the type of flagrant or deliberate violation of Fourth Amendment rights which the exclusionary rule was designed to prevent. Application of the exclusionary rule only to the situations which it was designed to deter results in a benefit to law enforcement by authenticating the fact-finding process. "As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971).

In view of the lack of perceptible logic inherent in the exclusionary rule and its apparent ineffectiveness

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[6]This formulation contains the substance of the criteria developed by the American Law Institute for application in the proposed "substantial violation" test. ALI, Model Code of Pre-Arraignment Procedure, § SS 8.02(2), p. 23 (Tent. Draft No. 4, 1971).

in directly deterring Fourth Amendment violations, it is essential that the scope of the exclusionary rule be limited to those circumstances which gave rise to its existence. Application of the deliberate or flagrant violation test strikes a proper balance between the competing interests of the individual in society—the right to be protected from criminal attack and the right preserved by the Fourth Amendment.

Conclusion

For the foregoing reasons petitioner, the State of California, submits that examination of abandoned trash does not amount to an unreasonable search and seizure proscribed by the Fourth Amendment and that, in any event, the exclusionary rule should not be applied under the circumstances of this case. Petitioner urges that the judgment of the California Supreme Court be reversed.

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Service of the within and receipt of a copy thereof is hereby admitted this 7th day of July, A.D. 1972.

Proof of Service Enclosed

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

This brief is being filed with this Court pursuant to the authority found in Rule 42 of the Supreme Court Rules. Consent to file this brief was given by the Office of the Attorney General of the State of California, counsel for Petitioner, and by Mr. Roger S. Hanson, Esq., counsel for Respondents. Letters of consent of both parties should be on file with the Clerk of this Court.

Interest of the Amicus Curiae

The California Public Defenders Association is a non-profit corporation, incorporated under the laws of the State of California in 1969. It was formed to assist Public Defender Offices in California in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation. The Association represents approximately 600 defense attorneys from thirty-four Public Defender Offices throughout the State of California.

A decision by this Court would have tremendous impact upon the rights of all indigent accused within the State of California. Further, if this Court rules upon the application of the Exclusionary Rule, the decision would have a profound effect upon state law since California adopted its own rule of exclusion in 1955 in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905. The California Supreme Court has developed higher standards to govern violations of its state constitutional prohibition against unreasonable searches and seizures. Since a decision in this area could seriously threaten the constitutional rights of the indigent accused with respect to the protections afforded by Article I, Section 19 of the California Constitution and the Fourth and Fourteenth Amendments of the United States Constitution, the California State Public Defenders Association is filing this brief as Amicus pursuant to the unanimous vote of its Board of Directors.

Summary of Argument

In *People v. Krivda*, 5 C.3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), the California Supreme Court based its decision on California case law, interpreting Article I, Section 19 of the California State Constitution which prohibits unreasonable seizures and searches. Since this holding presents an adequate state ground for the decision by the California court, this Court lacks jurisdiction to reach any federal constitutional issues. *Murdock v. City of Memphis*, 87 U.S. 590 (1875); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

The request by Petitioner that this Court narrow the scope of or eliminate the Exclusionary Rule cannot be granted since California developed its own, broader, Exclusionary Rule in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955), before the decision of *Mapp v. Ohio*, 367 U.S. 643 (1961). This independent state development enlarged the exclusionary remedy in California over that found in the federal system. Therefore, any action by this Court would be in derogation of California's Exclusionary Rule, and any holding of this Court would be gratuitous since the state rule governs the case.

The California Supreme Court correctly ruled that an individual has a reasonable expectation of privacy as to the contents of his disposal receptacle. It

is not unwarranted to recognize the realities of our modern, urban society where an individual is required to dispose of his personal discards through the refuse collector. Respondent's action, in placing the items into his disposal receptacle, indicated an intent to dispose of the items rather than abandon them. The California court recognized this distinction and correctly held there was a reasonable expectation of privacy.

The Exclusionary Rule should not be narrowed or abolished since there are no effective alternatives to ensure that the Fourth Amendment continues to have meaning. Further, the Courts should not participate in the illegal violations of an accused's Fourth Amendment rights. Convictions, based on these illegalities, debase the courts and breed contempt for the entire criminal justice system.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION UNDER TITLE 28, SECTION 1257(3) TO DETERMINE THE ISSUES PRESENTED IN THIS CASE SINCE THERE ARE INDEPENDENT STATE GROUNDS BASED ON THE CALIFORNIA STATE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES AND THE STATE MANDATED EXCLUSIONARY RULE.

Certiorari was granted in this case with probable jurisdiction noted under the authority of 28 U.S.C. Section 1257(3) which authorizes this Court to hear cases where,

> the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 *U.S.C. Section* 1257(3).

This Court has held that certiorari should not be granted in a case where state law is dispositive of the issue. *Murdock v. City of Memphis*, 87 U.S. 590 (20 Wall 590) 22 L.Ed. 429 (1875). The 1867 revision of Section 25 of the

Judiciary Act of 1789 by Congress was held to be indicative of an intent that the federal courts were not to interfere with state court decisions based on state grounds.

> (W)here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935).

In 1945, this Court in *Herb v. Pitcairn*, 324 U.S. 117 (1945) considered this question and decided that the Court should not render advisory opinions since the "case or controversy" requirement of Article III of the United States Constitution precluded such a result.

> Were (this Court) to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. *Department of Mental Hygiene of*

California v. Kirchner, 380 U.S. 194, at 197 (1965).

It is clear that if an independent and adequate state ground exists for the decision rendered by the state court, this Court is not free to review that decision. It is the contention of Amicus that the California Supreme Court rested its decision in *People v. Krivda*, 5 C.3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), on an interpretation of the California State Constitution, Article I, Section 19. The California Supreme Court's reliance on the California State Constitution presents an adequate and independent state ground precluding this Court from reviewing the propriety of that ruling.

A. When the California Supreme Court Rules on a Violation of Article I, Section 19 of the California Constitution Prohibiting Unreasonable Searches and Seizures, the United States Supreme Court Lacks Jurisdiction to Review That Decision Since An Independent And Adequate State Ground Exists for the State Court's Holding.

1. The Krivda Decision is Based on the California State Constitution.

Article I, Section 19 of the California State Constitution prohibits unreasonable searches and seizures in California.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. *West's Annotated Constitution, Article I, Section 19.*

The California Supreme Court has on numerous occasions enunciated rules for the application of this mandate prohibiting illegal searches and seizures. In its discussion of the "reasonable expectation of privacy" test in the case at bar, the California court referred specifically to cases which were grounded on the authority of Article I, Section 19, as well as the Fourth Amendment of the United States Constitution. [See *People v. Krivda*, 5 C.3d 357, 364, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971), wherein the court cites *People v. Edwards*,[1] 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) and

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[1] Defendant's neighbor informed police that a week before he had seen on defendant's back porch a large plastic bag containing packages, one of which was torn and contained a dark green vegetable substance with a smell unlike alfalfa and small funny type seed. The police entered into defendant's open backyard area without a search warrant.

People v. Bradley,[2] 1 C.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969).] Indeed, in the holding the Court points out that,

> It is also clear, as in *Edwards*, that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See *People v. Edwards*,

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They saw three trash cans located two to three feet from the back porch. In one can, they found a small amount of marijuana. The police took the material to be analyzed. They returned later without a search or arrest warrant and arrested the defendant and his wife in their house. The police searched the house after permission to do so was refused. Marijuana and LSD were found inside the house. The Supreme Court held these searches to be violative of the state and federal constitutions.

[2]On the information of an untested informer that defendant possessed and sold marijuana, the police went to the defendant's home without a search warrant. The police saw a marijuana plant growing in the backyard twenty feet from the defendant's door. The police then entered the defendant's residence without demanding admittance. The defendant was placed under arrest. The police searched the home without defendant's consent and found contraband. The court excluded the evidence found inside the house but admitted into evidence the marijuana plant found outside the house.

> *supra*, 71 C.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant. *People v. Krivda*, 5 C.3d 357, 367, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69 (1971).

The reference to pages 1104-1105 of *Edwards* is significant since it is directed to that section of the opinion which bottoms the ruling on the State Constitution, Article I, Section 19, as well as the Fourth Amendment of the United States Constitution.

> In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. *It similarly violated article I, section 19, of the California Constitution.* The trial court thus erred in admitting the evidence found in the trash can. *People v. Edwards*, 71 C.2d 1096, 1105, 458 P.2d 713, 718, 80 Cal.Rptr. 633, 638 (1969). (Emphasis added.)

People v. Bradley, *supra*, is also cited as authority for the proper test to apply when determining whether an

unreasonable search or seizure took place. The California Supreme Court based its decision, in part, on Article I, Section 19 of the State Constitution. After stating the provisions of the Fourth Amendment, the court went on to point out,

> (a)n essentially identical guarantee of personal privacy is contained in article I, section 19, of the California Constitution. *People v. Bradley*, 1 C.3d 80, 84, 460 P.2d 129, 131, 81 Cal. Rptr. 457, 459 (1969).

Petitioner, in his Opening Brief at 24 and in his Petition for Certiorari at 10, claims the California Supreme Court misinterpreted *Katz v. U.S.*, 389 U.S. 347 (1967), and improperly applied it to the case at bar. However, a closer reading of the opinion reveals that the California Supreme Court was merely alluding to similar principles in *Katz v. U.S.*, *supra*, and used it as authority for the "reasonable expectation of privacy" test under the Fourth Amendment of the United States Constitution. No further reference is made to *Katz v. U.S.*, *supra*, and, in the Court's holding, the authority relied upon are two California cases, *People v. Edwards*, 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969), and *People v. Bradley*, 1 C.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969), which applied the reasonable expectation of privacy test under the California State Constitution, Article I, Section 19. Consequently, the only reasonable

conclusion that can be drawn is that the court was employing a similar test to that found in *Katz v. U.S., supra,* but mandated by California caselaw under Article I, Section 19. Consider the language of the court:

> [W]e have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion. (*People v. Bradley,* 1 C.3d 80, 84; *People v. Edwards, supra,* 71 C.2d 1096, 1104-1105).
>
> *People v. Krivda,* 5 C.3d 357, 364, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971).

It is important to note that the court cited *Edwards,* not *Katz,* as authority for its holding. The reference to *Edwards* in *Krivda* was significant in that the court, although finding it unnecessary to apply *Edwards* retroactively, relied upon the logic in *Edwards.*[3]

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[3]This citation to *Edwards* is important since the *Krivda* search preceded the holding in *Edwards* but was after this Court's decision in *Katz.* The California court carefully points out that *Edwards* resolved the issue presented while failing to reach the question as to its actual application. Apparently, the court did not want to decide the retroactivity issue.

Further, the court went to considerable lengths on two occasions to point out the applicability of the holding in *Edwards*.

> We would be reluctant to distinguish *Edwards* solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection. *People v. Krivda*, 5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971) at fn. 7.

> The fact that the officers did not examine the contents until the trash had been placed into the well of the refuse truck does not distinguish *Edwards*, for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant. *People v. Krivda*, 5 C.3d 357, 366-367, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971).

The court failed to cite *Katz* as the authority for its holding and merely noted that *Katz* contained principles similar to those enunciated in *Edwards* and *Bradley*.

> We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in *Katz v. U.S.*, *supra*, may properly be applied to test the validity of the search and seizure at issue herein. *People v. Krivda*, 5 C.3d 357, 365, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971).

Note the language employed by the court and the issue for which it is cited. The paragraph deals with the question of the prospective application of *Edwards* and *Bradley*. *Katz* was cited as an example of the fact that *Edwards* and *Bradley* created no new law, but were simply a continuation of an historically developed test that "was put forth *at least* as early as *Katz*." *People v. Krivda*, 5 C.3d 357, 365, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971). (Emphasis added.) The reference to "at least as early as *Katz*" would indicate that the test may even have pre-dated *Katz*, as the California court implied in *Edwards* and *Bradley* by citing as authority for the "reasonable expectation of privacy" test the pre-*Katz* California decisions of *Bielicki v. Superior Court*,[4]

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[4] In *Bielicki*, *supra*, the police, authorized by the owner of an amusement park, went to the roof of a building in the park housing a group of pay toilets. A pipe, installed through the roof of the building over two of the toilet stalls,

57 C.2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962) and *Britt v. Superior Court*,[5] 58 C.2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962). The pointed reference to "like principles in *Katz*" would appear to be a recognition of the parallel development of state principles for the proper test tó judge illegal searches and seizures. The citation of *Katz* in this context underscores that *Katz* is merely being offered as an example to support the fact that *Edwards* and *Bradley* established no new constitutional principles. The reference to *Katz* is useful since it points out that the test of "constitutionally protected areas," which was often used in cases prior to *Katz*, was not the only test to be employed in determining the validity of a search or seizure. California, which had developed its own privacy test as early as *Britt v. Superior Court*,

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enabled police to look through and observe the defendant engaging in criminal activity. The California Supreme Court held this violative of the defendant's right to be free from unreasonable searches and seizures.

[5]In *Britt*, *supra*, a policeman viewed defendants engaging in criminal activity in the men's restroom. This activity was viewed through two vents installed in the ceiling of the restroom. On the authority of *Bielicki*, *supra*, this was held violative of the state and federal constitutions.

supra, and *Bielicki v. Superior Court*, *supra*, merely noted the same test in the federal courts was used "at least as early as *Katz*."

In light of the California Supreme Court's citation of *Edwards* and *Bradley* as authority to employ California's privacy test and its citation of *Edwards alone* in support of the determination of what constitutes a reasonable standard of privacy, the reference to *Katz* is merely gratuitous and not authority for the holding in *Krivda*.

The same Justice wrote the opinions of the court in *Edwards*, *Bradley* and *Krivda*. It would be odd, indeed, if, after *Edwards* and *Bradley* specifically referred to Article I, Section 19, of the California Constitution and were based on a privacy theory flowing from both the California and Federal Constitutions, the Court were to turn around and base its decision in *Krivda* solely on the federal constitution. This is especially unlikely in light of the final holding of *Krivda* which relies on *Edwards*.

The development in California of a theory based on the reasonable expectation of privacy test can be traced to pre-*Katz* decisions. For example, in his concurrence and dissent in *People v. Bradley*, 1 C.3d 80, 90, 91, 460 P.2d 129, 135, 136, 81 Cal. Rptr. 457, 463, 464 (1969), Justice Tobriner cites *Bielicki* and *Britt*, *supra*, as well as *Katz* and *Terry v. Ohio*, 392 U.S. 1 (1968) for the

proposition that protection against unreasonable searches and seizures is not "delimited by common law definitions of the curtilage, but extends 'wherever an individual may harbor a reasonable "expectation of privacy.'" It is important to note here that both *Bielicki* and *Britt* pre-date *Katz*, and both cases rest on Article I, Section 19 of the California Constitution, as well as the Fourth Amendment of the Federal Constitution. *Bielicki v. Superior Court*, 57 C.2d 602, 605, 371 P.2d 288, 289, 21 Cal. Rptr. 552, 553 (1962), and *Britt v. Superior Court*, 58 C.2d 469, 470, 374 P.2d 817, 817, 24 Cal. Rptr. 849, 849 (1962). Language in *Britt v. Superior Court*, 58 C.2d 469, 473, 374 P.2d 817, 819, 24 Cal. Rptr. 849, 851 (1962), supports the contention that *Krivda* is based on the state constitution, since the court specifically held that the search was impermissible and "hence [the evidence] was inadmissible *under the settled law of this state.*" (Emphasis added.)

These two cases were cited in the majority decision in *Bradley* despite the fact that the 9th Circuit had refused to follow their logic in *Smayda v. U.S.*, 352 F.2d 251 (9th Cir. 1965). This clearly indicates that the California Supreme Court recognized its independent right to develop theories in this area under state constitutional authority. This conclusion is consistent with the California court's refusal to follow the federal limitations on standing, discussed *infra*, at 23, and its pre-*Mapp*

adoption of the exclusionary rule. [See *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955).]

The conclusion is inescapable that this Court lacks jurisdiction to hear this case. Although the state court relied on "similar provisions in both the State and Federal Constitutions, the state constitutional provision ... provide(s) an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 491-492 (1965).

The fact that the California Supreme Court considered the provisions of the California Constitution and the federal constitution together, rather than analyzed them separately, does not imply that the state ground based on the state constitution "is so interwoven with the (federal ground based on the federal constitution) as not to be an independent matter ..." *Jankovich v. Indiana Toll Road Commission, supra*, at 490. This issue was forcefully answered in *Jankovich, supra*. In that case the state court decision relied upon state and federal constitutional provisions. The court noted that the Indiana Supreme Court discussed the Federal Constitution, United States Supreme Court cases, the state constitution, a prior state case interpreting state law, and other state precedent. This Court stated,

> But nothing in the court's opinion suggests that its conclusion ... flows from a federal rather than a state source. Indeed, the organization and language of the opinion indicates (sic) that, at the least, state law is an equal ground of decision.... (T)here is no intimation that the conclusion ... is based less forcefully on the Indiana Constitution than on the Fourteenth Amendment. *Id.*, at 491.

In the case at bar, the California Supreme Court referred to state decisional law for its holding no less forcefully than it referred to "like principles" found in *Katz*. As this Court observed in *Herb v. Pitcairn, supra*, at 126, "[O]ur power is to correct wrong judgments, not to revise opinions." The occasional references to *Katz* in the state court opinion in the case at bar does not lessen the fact that an adequate and independent state ground exists.

> ...(I)t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

> It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review. *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940).

This Court has no choice but to dismiss the present case for lack of jurisdiction.

2. Decision Ambiguous As To Federal or State Grounds.

Even if this Court were to hold that the reference to *Katz, supra,* and the state decisional law under Article I, Section 19, is ambiguous, the case must be dismissed rather than remanded, since it cannot be affirmatively shown that a decision of the federal question was necessary to the determination of the issue.

> (E)ven if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. *Black v. Cutter Laboratories, supra,* at 299.
>
> It is a well established principle of this Court that before

> we will review a decision of a state court it must *affirmatively* appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Williams v. Kaiser*, 323 U.S. 471, 477 (1945). (Emphasis added.)

Although this Court in *Minnesota v. National Tea Co., supra,* and *State Tax Commission v. Van Cott,* 306 U.S. 511 (1939), remanded to clear up the ambiguity, the facts are clearly distinguishable from those at bar. In *Minnesota* this Court relied solely on the statement made by the Minnesota Supreme Court that five decisions (two were U.S. Supreme Court cases, one was a federal case, one was a Wisconsin case, and one was a Vermont case) directly deciding the issue, disposed of the question and it was the state court's duty to follow them. The state supreme court either had no state case law supporting the issue, or it failed to rely on state precedent in a resolution of the question. The California Supreme Court, in the case at bar, cited its own case law to justify its holding. Clearly, California had adequate state authority to support its decision. Similarly, in *Van Cott,* the state supreme court thought the federal constitution, as construed by the United States Supreme Court, required it to hold the respondent

taxable. Relying on that holding, this Court remanded the decision for clarification. Since the California Supreme Court relied on state precedent in the instant case, remand is not necessary. This Court should not indulge in gratuitous dissertations on constitutional law. State courts must be left free and unfettered to interpret their own constitutions.[6] Therefore, the petition for writ of certiorari should be dismissed.

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[6]If this Court determines that dismissal is not the appropriate remedy in this case, it should remand for two reasons:

(a) The California Supreme Court should clarify its holding. "(I)t seems consistent with the respect due the highest courts of the states of the Union that they be asked rather than told what they have intended." *Herb v. Pitcairn, supra,* at 128.

(b) Under the authority of *Standard Oil of California v. Johnson,* 316 U.S. 481 (1942), this Court would have to remand the case to the California Supreme Court to decide the prospective application of *Edwards* and *Bradley* and resolve the question of the application of pre-*Katz* cases dealing with the reasonable expectation of privacy test. Before a final judgment can be entered, this unresolved state issue must be decided by the state court.

3. The Issue Presented Has Been Resolved By Subsequent State Decisions.

This Court lacks jurisdiction to decide this case since the issue presented has been resolved by California decisional law. The California State Supreme Court held in *Edwards* that individuals have a reasonable expectation of privacy with respect to the contents of their trash cans until it is commingled with that of the community. Under the authority of *Edwards*, therefore, any search and seizure in California of a trash can located inside a defendant's backyard or located on the sidewalk in front of his residence is in violation of the California Constitution.

Rule 19 of the Revised Rules of the Supreme Court of the United States reads in part,

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons* therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> a) where a state court has decided a *federal question of substance* not theretofore determined by this

> court, or has decided it in a way probably not in accord with applicable decisions of this court. (Emphasis added.)

The United States Supreme Court in *Rice v. Sioux City Cemetary*, 349 U.S. 70 (1955), had occasion to interpret the language "special and important reasons" contained in Rule 19. In considering a petition filed for a rehearing, this Court found that a state statute, enacted after the litigation was commenced, was dispositive of the issue presented, thereby precluding the issue from arising again. As a consequence, this Court held that there were no "special and important reasons" for granting certiorari on a "federal question of substance" if this Court's decision would merely "benefit ... the particular litigants." (See *Rice v. Sioux City Cemetary, supra*, at 74.) The time of this Court should not be spent resolving a problem of scholastic interest only.

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. *Id.*, at 74.

The instant case presents the identical issue, since the state Supreme Court resolved the question in *Edwards* and *Bradley*. Any opinion by this Court would have no impact on future decisions of the state court, since the issue has been resolved. Therefore, this Court should dismiss the petition for writ of certiorari as improvidently granted.

B. Since the California Supreme Court Has Held That Its Exclusionary Rule is a Judicially Declared Rule of Evidence And Mandated by the California State Constitution, the Application of the Rule by the California Supreme Court Presents an Adequate State Ground Precluding This Court From Determining the Validity or Application of the Federal Exclusionary Rule.

Assuming *arguendo* that this Court is able to reach the substantive issue of the application of *Katz* to the facts of the case at bar, this Court cannot reach the validity or application of the federal exclusionary rule as a remedy since the California state exclusionary rule presents an independent state ground precluding federal jurisdiction.

Prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the California Supreme Court held in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905

(1955), that the exclusionary rule in California was a "judicially declared rule of evidence." Chief Justice Traynor wrote that the rule was necessary to perpetuate the "concept of ordered liberty." The rule was not justified solely on the federal theory that evidence should be excluded to provide a remedy for a wrong done to a defendant. Rather, the Court held that the rule in California was compelled because "the government must not be allowed to profit by its own wrong and thus be encouraged in the lawless enforcement of the law." *People v. Martin*, 45 C.2d 755, 761, 290 P.2d 855, 857 (1955). As late as 1971, the California Supreme Court acknowledged that the exclusionary rule was required in "order to give substance to the rights conferred by the provisions of our federal and *state Constitutions* prohibiting illegal seizures." *Kaplan v. Superior Court*, 6 C.3d 150, 161, 491 P.2d 1, 98 Cal.Rptr. 649 (1971). (Emphasis added.) The court went on to cite the authority of Article I, Section 19 of the California State Constitution. If there were any doubt that the California Supreme Court was interpreting its own constitution, this was laid to rest by the words of Justice Burke in his concurrence and dissent, when he pointed out that his fellow justices were determining the scope of the exclusionary rule and had "abandoned further reliance upon federal constitutional principles, as defined by the United States Supreme Court." *Ibid.*, 6 C.3d at 162, 491 P.2d at 8, 98 Cal. Rptr. at 656.

A person need not be a constitutional scholar to recognize that California has not only developed its own rules for the suppression of evidence but broadened their coverage beyond that afforded by this Court's interpretation of the federal exclusionary rule. For example, in *Kaplan v. Superior Court, supra,* the California Supreme Court endorsed once again the vicarious exclusionary rule despite the fact that the holding was contrary to this Court's decision in *Alderman v. United States,* 394 U.S. 165 (1969). California has decided to adopt higher standards for the implementation of its citizens' right to be free from unreasonable searches and seizures.[7]

Penal Code Section 1538.5[8] was adopted to implement the California decisions requiring the exclusion of

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[7] This Court, in fact, invited such independence. "Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman v. U.S.,* 394 U.S. 165, 175 (1969).

"Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." *Cooper v. California,* 386 U.S. 58, 62 (1967).

[8] "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure ..."

evidence. In the case at bar, this vehicle was used to suppress the evidence found in the defendant's garbage can. Since California has its own exclusionary rule and its application is not in conflict with the federal constitution, there is no federal question presented for this Court to decide. As was stated by this Court in *Edelman v. California*, 344 U.S. 357, 361-362 (1953).

> This is not a case in which there is serious doubt about the nature of the ground on which the decision below rested. *(Citations)* We are thus without power to decide petitioner's claim on the merits, whatever may be their appeal. The writ was improvidently granted and must be dismissed.

This Court has no jurisdiction to decide the validity of the federal exclusionary rule since the application of the state exclusionary rule rested on an adequate state ground. [9]

West's Annotated Penal Code, Section 1538.5(a).

[9] It would appear under the authority of *Herndon v. Georgia*, 295 U.S. 441 (1935) that this issue cannot be raised for the first time on petition for rehearing in the state courts nor petition for writ of certiorari in this Court. (See also *A. F. Estabrook Co. v. Industrial Accident Commission*, 177 Cal. 767, 771, 177 P. 848, 849 (1918).

II.

A CITIZEN HAS A RIGHT TO BE FREE UNDER THE FOURTH AMENDMENT FROM UNREASONABLE SEARCHES AND SEIZURES BY THE POLICE OF HIS DISPOSAL RECEPTACLE.

A. The Reasonable Expectation of Privacy Test.

In 1967 this Honorable Court made explicit that,

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States*, 389 U.S. 347, 351-2 (1967).

While the *Katz* case itself dealt with electronic bugging of a telephone booth, subsequent decisions of both this Court and the Circuit Courts of Appeal have made clear that physical searches and seizures of tangible items are covered by the test as well. Thus, in *Terry v. Ohio*, 392 U.S. 1, 9 (1968), this Court applied the protection of *Katz* to an individual on a public street.

> We have recently held that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L Ed 2d 576 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *Id.*, at 361, 88 S.Ct. at 507 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.... Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Id.*, at 9.

In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the *Katz* test was applied to the warrantless search for union records of an office which the defendant Mancusi shared with several other union officials.

> The Court's recent decision in *Katz* ... also makes it clear that capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. *Id.*, at 368.

Numerous decisions of the Circuit Courts of Appeal have analyzed situations outside the electronic surveillance

area in terms of *Katz*'s reasonable expectation of privacy test. See, *inter alia*, *Wattenburg v. United States*, 388 F.2d 853 (9th Cir., 1968) (search of trees thirty-five feet from suspect's motel); *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir., 1970) (border searches); *United States v. Case*, 435 F.2d 766 (7th Cir. 1970) (eavesdropping from hallway adjacent to suspect's business premises); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (police search of college dormitory rooms where the students had signed a consent form with the university); *Fraser v. United States*, 452 F.2d 616 (7th Cir., 1971) (grand jury subpoena after grant of transactional immunity); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969) (citizen driving an automobile).

In light of this case precedent, it seems clear that the reasonable expectation of privacy test has general applicability whenever there has been intrusive action by governmental officers. Because the old rules of trespass, penetration and property interests were inflexible and inappropriate to deal with rapidly changing conditions and technology of a modern society, this Court came to recognize that "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [has] increasingly discarded fictional and procedural barriers rested on property concepts." *Warden v. Hayden*, 387 U.S. 294, 304 (1967). Commentators have noted that the former rules resulted in

"some strangely literal turns." Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke Law Journal 319, 332. It was against this background of inflexibility that the reasonable expectation of privacy test emerged.

This emphasis on privacy takes on new meaning in a modern industrial society. It is indispensable to our most fundamental and cherished values.

> We may wish to do or say things not forbidden by the restraints of morality, but which are nevertheless unpopular or unconventional. If we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes. Fried, *Privacy*, 77 Yale L. Journal, 475, 483-484 (1968).

One sanctuary for such privacy, long recognized by this Court, is a man's home. As the late Justice Frank noted,

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they can not get him without disobeying the

> Constitution. That is still a sizable hunk of liberty - worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle. *U.S. v. On Lee*, 193 F.2d 306, 315-316 (2nd Cir. 1951) (Dissenting Opinion)

Today's modern, crowded, technological world threatens to invade even that enclave. Wiretapping and electronic surveillance have been recognized as such threats. *Berger v. N.Y.*, 388 U.S. 41 (1967); *U.S. v. U.S. Dist. Court Eastern Michigan*, No. 70-153, June 19, 1972. This Court took the necessary steps to ensure that modern technology would not circumvent the protections our Forefathers intended by the adoption of the Fourth Amendment. In the instant case, this Court is again faced with that choice - either permit an encroachment on our right to privacy or recognize the realities of the modern world and provide the protection envisioned by the Fourth Amendment.

Living in today's "castle," a citizen accumulates many items. Some of these items are innocuous; others are extremely private, e.g., love letters, old tax forms, letters from a lawyer or physician, contraceptives, political or religious printed matter, medical prescriptions, patent medicines, and bills.

Unable to provide storage indefinitely for all these items, a method for disposal must be found. Governmental ordinances and statutes severely curtail his options. Unlike his rural cousin, he is prevented from disposing of these items by burning or burying them. The same society which has denied the citizen these traditional methods of disposal has, however, developed a modern alternative - the refuse collector. The citizen, either through taxes or out-of-pocket, purchases this service for disposal of his personal discards. Items are placed in a garbage can, often sealed in a "baggie," to await collection. City ordinances often require the homeowner to place the cans on the sidewalk for collection, with regulations as to who may collect the containers, prohibiting unauthorized persons from tampering with the refuse. The contents of these containers are picked up and dumped into the well of a large truck, thereby losing "identity and meaning by becoming part of a large conglomeration of trash elsewhere." *People v. Krivda*, 5 Cal.3d 357, 366, 96 Cal. Rptr. 62, 68, 486 P.2d 1262, 1268 (1971).

Respondent and his neighbors have a reasonable expectation of privacy in this disposal method which the modern city has developed to replace the freedom of an earlier, simpler life where the citizen could personally dispose of his refuse without fear of governmental intrusion.

Petitioner takes issue with this contention and claims that no reasonable expectation of privacy existed due to the risk of exposure once the trash barrel was placed on the parkway for collection.[10] It is claimed that nosey neighbors, curious passersby, or domestic animals might disturb the contents, thereby precluding any expectation of privacy. However, as the court in *Krivda* recognized, a city ordinance made such tampering illegal, thereby indicating a recognition by the state of the intended privacy of a citizen's refuse disposal. Further, Respondent manifested a desire for privacy by placing the seized items in a closed bag inside the garbage can. In the method of collection, Respondent's refuse would have been commingled with his neighbors so as to lose its identity.

As this Court has stated, "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be protected." *U.S. v. Katz, supra,* at 351-352.

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[10]Petitioner's citation to *U.S. v. Jackson,* 448 F.2d 963 (9th Cir. 1971) is inapposite since it involved the search of a trash can situated along a public passageway outside a motel room which the *police reasonably believed to have been vacated.*

Next, Petitioner[11] contends that Respondent gave the refuse collector such complete and unrestricted freedom over the contents of his garbage can that he accepted the risk that the collector would consent to a search of it by the police. Several assumptions are made in this argument, i.e., the collector gave consent to the police for the search rather than simply complying with police instructions; and the homeowner automatically gives complete and unrestricted freedom over the contents of his garbage to any collector.

By casting the facts in this light, Petitioner essentially begs the question. It was the *police* who ordered the garbage collectors to deviate from their normal routine, empty the well of their truck, specially pick up the contents of Respondent's trash can and return to a prearranged area for the *sole* purpose of inspection. It is not the garbage collector as a free agent acting in this case. Rather, it is the collector as police agent at work. The action is "cast in the form of a [garbage collection] to enable the officers to avoid the requirements of the Fourth Amendment." *Corngold v. U.S.*, 367 F.2d 1, 5 (1966). [See also *Stoner v. State of California*, 376 U.S. 483 (1964).] From this perspective, the question becomes the action of the police rather than the possible consent of the garbage collector to the governmental intrusion. The

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[11]Petitioner's Opening Brief at 8, 28, 30.

cases cited by Petitioner are distinguishable since they revolve around the independent actions of individuals who notify the authorities of their find as in *Gold v. U.S.*, 378 F.2d 588 (1967); or, there is no question that there is a voluntary consent to a police search as in *Clarke v. Neil*, 427 F.2d 1322 (1970). In the latter case, the court never considers the issue of whether the manager of a cleaning establishment is acting as an agent of the police since Appellant never raised that issue, and the court accepts this failure[12] as an admission that the search was *per se* lawful. The holding goes to the viability of the "mere evidence rule." (See *Clarke v. Neil, supra*, at 1324.)

A second question is raised in *U.S. v. Eldridge*, 302 F.2d 463 (1962), wherein the court holds that the loaning of a vehicle to a friend was the equivalent of an unrestricted use, including consenting to a police search of the trunk. The Court specifically noted that the result might have been "different," "if, for example, [the police] had explored

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[12] "Appellant does *not* contend that the manager of the cleaning shop had no authority to consent to the police search of the premises or that his consent was not voluntarily given. Therefore the search itself was unquestionably lawful. *Clarke v. Neil*, 427 F.2d 1322, 1324 (1970). (Emphasis added.)

under the floor carpeting or behind the upholstery."[13] *U.S. v. Eldridge, supra,* at 466. There is language in the opinion which indicates the result might have changed had there been "collusion" between the officers and the friend.

In the case at bar, the garbage collectors were acting in concert and at the behest of the police. Further, the arrangement which an individual enters into with his municipality or refuse collector is not unlimited. First, by ordinance, Respondent was *required* to dispose of his personal refuse by the use of the sanitation company. [*People v. Krivda*, 5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Calif. Rptr. 68 (1972).] Presumably, the only power given to the sanitation company is to remove Respondent's garbage from his home, commingle it with that of his neighbors, and deposit it at specified sites designated by the city. There is no unrestricted right to rummage through the contents of each bag or box, removing what the collector desires, and disposing of the remainder. Since Respondent is under compulsion via city regulation to dispose of his personal refuse in a particular manner, the only right the collector is given is to remove it to the local dump for destruction. The California court, after noting the applicable municipal ordinances, categorizes the relationship as one of limited consignment. [See *People v. Krivda,*

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[13]This would be the equivalent of the closed bag within the garbage can.

5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971).] This limited power surely cannot be construed to be the equivalent of unfettered control over an item given to a friend to do with as he pleases. Consequently, the consent cases are inapposite to the facts at bar.'

Petitioner next contends that the refuse receptacle was abandoned, thereby precluding Fourth Amendment coverage under the authority of *Hester v. United States*, 265 U.S. 57 (1924) and *Abel v. United States*, 362 U.S. 217 (1960).

Under the test developed for determining whether an item has been abandoned, the courts have held that "abandonment ... is largely a question of intent." *U.S. v. Minker*, 312 F.2d 632, 634 (3rd Cir. 1962). The intention "to abandon will not ordinarily be presumed, and this is particularly true if the conduct of the owner can be explained consistently with a continued claim. Proof of abandonment must be made by the one asserting it by clear, unequivocal and decisive evidence." *Linscomb v. Goodyear Tire and Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952).

Petitioner fails to meet the test set out in *Linscomb v. Goodyear Tire and Rubber Co., supra*, since no reasons are given for the conclusion that the contents of Respondent's refuse receptacle

were abandoned.[14] The record before this Court indicates the contrary intent. In our modern society, the discards of one's very personal life can be disposed of by only one method, i.e., refuse collection.

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[14]Petitioner cites several cases to support his inference of abandonment from Respondent's act of depositing the items in the disposal receptacle. These cases are inapposite.

In *Abel v. United States, supra,* the search of a waste basket in a hotel room was upheld since the room was vacated and hotel employees were free to examine its contents. In the case at bar, the items were removed from a closed receptacle in front of Respondent's occupied home.

In *United States v. Stroble,* 431 F.2d 1273 (6th Cir. 1970), the seized items were not found inside a container but lying exposed beside the trash container.

In *State v. Purvis,* 249 Ore. 404, 438 P.2d 1002 (1968), the items were seized in an open container in a hotel room. In addition, the Court's holding was based on the finding of no state action. See *Purvis v. Wiseman,* 298 F.Supp. 761 (1969), wherein a hearing on a writ of habeas corpus was granted to determine if indeed there had been state action, thereby implying no abandonment.

In *United States v. Dzialak,* 441 F.2d 212 (1971), the court fails to distinguish between the intent to abandon and the intent to dispose.

In any discussion of the concept of abandonment, a distinction must be made between the intent to abandon and the intent to dispose of personal effects. In abandoning an item, a citizen not only gives up any future possessory interest but holds no concern for the ultimate placement or destination of the item. The same is *not* true in the disposal of personal effects. While giving up future possessory interest, there is an interest to have the items come to rest in a particular place. The situation is analagous to the mailing of a letter or package to another party. The individual gives up his future possessory interest when he places that letter in the mailbox or turns the package over to a carrier. In both, however, his interest is that the items be delivered to a particular place. Respondent paid, either through taxes or out-of-pocket, to have his personal effects collected. His interest was that the items be removed from his closed container to the well of the refuse truck, commingled and deposited at the city dump. The intention is clear. Nosey neighbors or anyone else are to be precluded from sifting through the remnants of the most private area of his life.[15]

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[15]Three cases have stated that the placing of an item in a disposal receptacle does not establish abandonment. See *Work v. United States*, 243 F.2d 660

The argument is advanced that any Fourth Amendment protections in this area would make "the garbage receptacle an inviolate sanctuary for the concealment and disposal of evidence of crime." (See Petitioner's Opening Brief at 31.) There is no substance to this emotional argument, since the police are free to search any disposal receptacle suspected of containing contraband at a citizen's home if they take their information before an impartial magistrate and secure a warrant or establish an exception to the warrant requirement. The decision would, however, prohibit as an investigative tool the whimsical rummaging by police officers of the effects of the most personal areas of a citizen's life. This Court would thus ensure that a dweller in one of today's congested urban areas would, like his rural cousin, be assured privacy in the disposal of his personal effects.

(D.C. Cir. 1957); *State v. Chapman*, 250 A.2d 203 (S.C. Maine 1969); and *People v. Edwards*, 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (Calif. S.C. 1969).

B. Trash Collectors Acted as Agents for the Police.

The California Supreme Court in its opinion below necessarily held that the action of the trash collectors was governmental action attributable to the police. This follows from the fact that the court repeatedly referred to the issue before it as a "search of defendants' trash barrels." *Krivda, supra,* at 364.[16] Since only the trash collectors handled the garbage cans, the court had to conclude that they were acting as agents of the police and hence that the legal

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[16]Note the following language also: "The question remains whether defendants herein had a reasonable expectation of privacy with respect to the contents of their trash barrels." *Krivda, supra,* at 365. "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public." *Id.*, at 366. "We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without... a search warrant." *Id.*, at 367. "[T]he marijuana found in defendants' trash barrels was the result of an illegal search and seizure." *Id.*, at 367. Note, too, that in *Edwards, supra,* no trash collectors were involved, and the California Supreme Court specifically held *Krivda* to be indistinguishable from *Edwards. Krivda, supra,* at 66-67, and at 66 fn. 7.

basis for the search was the same as though the police had themselves searched the cans. *Stapleton v. Superior Court of Los Angeles County*, 70 Cal.2d 97,101, 447 P.2d 967, 970, 73 Cal. Rptr. 575, 578 (1969).

The determination by the California Supreme Court is binding on this Court. The nature and scope of the powers of the police are matters of peculiarly local concern. While the Federal Constitution sets minimum standards as to what constitutes governmental action, the states are surely free to expand upon the concept for the protection of their citizens. California itself has gone far toward articulating and clarifying this power. See, e.g., *West's Annotated California Penal Code* Sections 830 et seq., 833 et seq., 1530-1533. The California Supreme Court, in necessarily finding that the trash collectors were agents of the police, was ruling on the use and delegation of the police's power. The court decision was entirely consistent with a well-established line of prior state cases holding similar use of private persons to be governmental action. *People v. Tarantino*, 45 Cal.2d 590, 595, 290 P.2d 505 (1955); *People v. Fierro*, 236 CA 2d 344, 46 Cal. Rptr. 132 (1965); *Stapleton v. Superior Court of Los Angeles County, supra*, 70 Cal.2d 97, 73 Cal. Rptr. 575, 447 P.2d 967 (1969). Under such circumstances, the ruling of the California Supreme Court may not be disturbed by this Honorable Court. *Murdock v. Memphis, supra*, 87 U.S. 590 (1875).

A finding that the trash collectors were acting as agents of the police is compelled under federal law as well as state law. The relevant principles were first set forth in *Byars v. United States*, 273 U.S. 27, 32-33 (1927).[17] There a federal agent was asked by state officers to accompany them in the execution of a state search warrant. The search turned up evidence of a federal crime. Because, prior to *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L Ed 2d 1669 (1960), "state police were considered as private parties relative to federal prosecutions,"[18] this Court was faced with the issue of whether the search was carried out as a federal police search, so that the exclusionary rule would apply. Despite the fact that the state officers had obtained a search warrant without federal prompting and that the federal agent accompanied the four state officers only

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[17] More recently, in *Massiah v. United States*, 377 U.S. 201, 206-207 (1964), this Court found that statements elicited by a co-defendant, who was cooperating with the police, from an individual under indictment, violated that individual's Sixth Amendment right to counsel. An essential element in reaching this result was a finding of governmental action. The use of the co-defendant by the police provided this link.

[18] *United States v. Masterson*, 251 F. Supp. 937, 940 (D.C.N.Y., 1966), aff'd 383 F. 2d 610; *cert. den.* 385 U.S. 833.

by request of one of them, this Court held that,

> The search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own. *Id.*, at 33.

Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) is on all fours with the instant case. There, federal customs agents suspected defendant was in possession of illegally imported watches. They located him and two companions at the TWA cargo loading platform at the Los Angeles Airport. The agents approached TWA's ramp manager and asked him to find out about the boxes Corngold was shipping, from Corngold's companion. The ramp manager located the packages for the agent. When Corngold and his companions had left, the agents returned, conducted a "scintillator" test of Corngold's packages, and told the TWA transportation agent they suspected the package contained watches. After determining that the TWA agent had authority to open the package, the customs agents ordered him to do so. He complied. A number of Swiss watches were found. The Court held the search of the packages was not a private search.

> [A]t the very least, the search of appellant's package was a joint operation of the customs agents

> and the TWA employee. When a federal agent participates in such a joint endeavor, "the effect is the same as though he had engaged in the undertaking as one exclusively his own." *Byars* ... As Justice Frankfurter said in *Lustig v. U.S.*, 338 U.S. 74, 78-79 ...
>
> > "It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it all."
>
> *Corngold, supra,* at 6.

The instant case is covered by the principle and facts of *Byars, Massiah* and *Corngold.* The search constituted police action as a matter of federal law. Consider the extent of involvement of Officers Gates and Marsden in controlling the conduct of the refuse collectors. The officers required the collectors to empty their truck, drive at once to 1901 Norden, empty the trash barrels there, drive one block north, stop and allow the officers to sift through the trash. The whole procedure was unlike the normal routine. Nothing indicates that, but for the police commands, the collectors would have treated the Krivdas' trash any differently from any other trash barrel. Nor is it likely that the

trash collectors would have observed anything illegal since "the contraband was concealed in paper sacks within the barrels." *Krivda, supra,* at 366. On these facts the search is precisely like that in *Corngold, supra.* The search cannot be classified as a private search because the police controlled the conduct and the scope of the search of the Krivdas' trash can.

C. The Curtilage Doctrine.

The protections afforded by the Fourth Amendment have not been restricted to the interior of houses, but have been extended to open areas immediately adjacent. *Wattenberg v. U.S.*, 388 F.2d 853 (9th Cir. 1968). Under this doctrine, usually referred to as curtilage, a close analysis of the facts is necessary to determine if the area in question is covered. The Tenth Circuit in *Care v. U.S.*, 231 F.2d 22, 25 (1956) enunciated the test to be used.

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

In the case at bar, the contents of Respondent's garbage can were sifted and

examined by the police after an elaborate ruse to obtain them. It would appear from the facts that the garbage cans were kept on the front porch of the respondent's house since that is where they were taken to after the garbage collector had gone. *People v. Krivda*, 5 C.3d 357, 360, 486 P.2d 1262, 1263, 96 Cal. Rptr. 62 , 63 (1971). The police gained access to the cans by asking the collector to remove the trash in the well of his truck, pick up Respondent's cans and empty them, and then return to the police so that the police might examine the garbage. By this method, the police avoided seizing and searching the can themselves. In order to analyze fairly the actions of the police, this ruse must be viewed as such and the garbage collector as their agent. Since everything the garbage collector did was at the invitation and direct order of the police, the issue becomes whether the police had a right to search Respondent's garbage can without a warrant. Further, a local municipal ordinance required Respondent to place his garbage can on the public sidewalk if he wanted it to be collected. [See *People v. Krivda*, 5 C.3d 357, 366, fn. 7, 486 P.2d 1262, 1268, 96 Cal.Rptr. 62 , 68 (1971).] As a result, the trash can was on the public sidewalk rather than on the porch of the house where it was customarily kept. Since a person's constitutional protections cannot be limited by the employment of

a municipal ordinance,[19] Respondent's case should be analyzed by placing him in the same position as others without the ordinance, i.e., as if the garbage cans were searched while on the front porch of Respondent's residence.

Applying these facts to the test enunciated in *Care v. U.S., supra,* it is clear that Respondent's garbage can falls within the curtilage of his home. It is on the front porch of the house which makes it in "proximity or annexation to the dwelling" and within the "general enclosure surrounding the dwelling" and the cans were used as an "adjunct to the domestic economy of the family" since no family in this day and age can do without one. Therefore, the cans on the porch come within the protected area of the Fourth Amendment.

The facts of this case are stronger than those found in *Work v. U.S.,* 243 F.2d 660 (D.C. Cir. 1957), wherein the circuit court held,

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[19] *Bailey v. Alabama,* 219 U.S. 219, 239 (1911).

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment."

[See also, *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Speiser v. Randall,* 357

> The trash receptacle in which the phial was found was in close proximity to the house. It was an adjunct to the domestic use of the home by appellant. It was within the curtilage or general enclosure surrounding the dwelling. *Id.*, at 662.

Since any governmental incursion of the curtilage is covered by the Fourth Amendment, the actions of the garbage collectors as agents of the police clearly must meet the warrant requirement. Therefore, the search of the garbage cans and the seizure of their contents was unconstitutional since it was carried out without a warrant.

U.S. 513 (1958) which are analagous, since both disallow a diminution of a constitutional right by adoption of a state statute.

III.

THE EXCLUSIONARY RULE IS REQUIRED TO GIVE MEANING AND SUBSTANCE TO THE FOURTH AMENDMENT AND TO ENSURE THE CONTINUATION OF JUDICIAL INTEGRITY WITHIN THE CONCEPT OF ORDERED LIBERTY.

A. The Rationale of the Rule.

In any consideration of the viability and scope of the Exclusionary Rule, it should be remembered that it serves a twofold purpose, i.e., to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct. [See *Weeks v. U.S.*, 232 U.S. 383 (1914).] The latter purpose is often overlooked in the haste of critics to narrow the scope of or to eliminate the Exclusionary Rule completely. There is good reason for this avoidance since any change in application or scope would come into direct conflict with the second, and perhaps, most important reason for the rule.

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to

> become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928), (Brandeis, J. dissenting).

The respect for the "imperative of judicial integrity" has been reduced by some commentators to a "game" played by the state and the accused.[20] However, this aspect of the rule cannot be so lightly dismissed for the integrity of the system plays a very real role in the viability of the republic.[21]

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[20] See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 414 (1971), where in dissent the statement is made that "the Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rules."

[21] "Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for

In a democratic system, if the citizens have no respect for the government and its institutions, it is only a matter of a few steps to the disintegration of that society. In an age when our institutions are under attack as they have never been before, it is scarcely the time for the government to set into motion forces which will undermine the confidence of citizens in their system. When an individual's liberty hangs in the balance, the government must act in accord with its own rules or else it compromises its right to require its citizens to follow its rules. The society is faced with the anomaly of the state punishing, usually rather harshly, the individual citizen who breaks the law - based on a conviction which was gained as a direct result of the lawlessness of the government itself. This brings internal conflict which places great stress on continued respect for the government.

It is not only the integrity of the courts to which this problem is addressed, but also the integrity of the Constitution which protects each individual within our society.

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contempt of law. Respect for law can not be turned off and on as though it were a hot-water faucet." *On Lee v. United States*, 343 U.S. 747, 758, 759 (1951), (Frankfurter, J., dissenting).

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures ... *should find no sanction in the judgments of the courts* which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. *Weeks v. United States*, 232 U.S. 383, 392 (1914). (Emphasis added.)

If a society expects its citizens to uphold the law, it can expect no less from its government. The concern for the plight of the police within our system, outlined in the briefs of Amici, is commendable, but it ignores the fact that our police will lose more respect if they earn convictions of citizens with "unclean hands," resulting from illegal acts. Our police deserve better than that. As this Court observed in *Miller v. United States*, 357 U.S. 301, 313 (1958), "the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."

A large number of the cases coming before our trial courts today (in which violations of the Fourth Amendment are alleged) involve marijuana and dangerous drug complaints against persons under 25 years of age. It is important that these young people perceive that the system is a fair and just one. When they come in contact with the court and

observe that, if the officer has violated their constitutional rights the state is precluded from using the evidence against them, they cannot help but respect that system. It is graphically brought home to them that the Bill of Rights is not simply words put to paper at the founding of the republic, but is a reality in this complex twentieth century. They find that the decision of the court,

> founded on reason and *truth*, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

The Attorney General of Illinois in his Amicus brief speaks in terms of the rule "punishing society." *Amicus Brief of the State of Illinois*, at p.4. How is society punished by a rule that ensures that the state respects its citizens' constitutional rights and does not benefit by any violation of those rights? How does the rule punish society when it underscores the fact that the Bill of Rights is not merely rhetoric but a living, breathing document that speaks to each individual and disallows the state to profit from its own wrongdoing?

B. Suggested Changes in the Rule.

The argument is put forward that because the police have refused to follow the law and respect the Constitution, the individual citizen's constitutionally guaranteed right to be free from unreasonable searches and seizures should be eliminated. This reasoning suggests that rules of proper behavior should be changed because the police refuse to follow them. If this were taken to its logical conclusion, the laws against bribery of a public official would be removed from the statute books because in recent exposures in New York City it has been charged that many police accept bribes. A premium is placed on disrespect of the law by the enforcers of the law. The lesson to the police is clear. If they ignore constitutional limitations on their power long enough, the courts will simply change the rule to fit their behavior. A most curious rule for any society; and a most dangerous rule for a democratic society.

It is further suggested that the scope of the rule be narrowed to cover only those violations of the constitution which are blatant; that where there are "inadvertent errors of judgment" the violation be overlooked. [See *Bivens v. Six Unknown Federal Narcotics Agents, supra*, at 418.] However, the state does not follow that rule with regard to its citizens' violation of the rules of the criminal law. Citizens are prosecuted every day for "inadvertent errors of judgment" and they are fined and

sentenced for those "errors."[22] Why should the government be excused when its citizens are not? Should there not be equality under the law?

The idea of a "rationally graded response" to the violation of the Fourth Amendment is the equivalent of holding that a little bit of illegal activity is all right. This concept would strike at the heart of our criminal justice system. Further, it would encourage the police to "search now, justify later."

Many commentators call for clearer, more definitive rules in this area, and then advocate a vague and indefinite standard for a police officer on the beat to follow. For example, the suggestion is made that the proper test would be whether "no reasonable cause [existed] to believe there was reasonable cause." *Amicus Brief of State of Illinois*, at 11. If the police are having difficulty at the present time determining whether they must secure a search warrant and whether they have established probable cause for foregoing the warrant, consider the difficulty of deciding whether a cause is reasonable or not. The end result of such a rule would be to search and hope the court would later find it reasonable. At least under the present rule, the

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[22]For example, under California law, a person can be convicted for offenses ranging from speeding to involuntary manslaughter due to his "error of judgment."

officer knows that if he errs, the evidence cannot be used.

> It is perhaps worth repeating that although this court may now be faced with the choice of justifying a warrantless search or letting a guilty man go free, that choice did not face the customs officers. They could have secured a warrant, or, if probable cause for search was lacking, continued their investigation until information establishing probable cause was obtained. *Corngold v. U.S.*, 367 F.2d 1, 8 (9th Cir. 1966).

There is no data which has been presented to this Court which would justify the elimination or drastic narrowing of the scope of the Exclusionary Rule. Even the author of the most thorough empirical study of this aspect of the rule came to the conclusion that his data did not provide any "empirical substantiation or refutation of the deterrent effect of the Exclusionary Rule."[23]

There is graphic evidence that the Fourth Amendment does not work without it. *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955). The experience of the

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[23]Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 Chicago Law Review 665, 709 (1970).

California courts should not be dismissed lightly. In his discussion concerning the merits of the rule, former Chief Justice Roger Traynor of the California Supreme Court was "compelled to reach" the conclusion that "other remedies have failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule (allowing admission) have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." *People v. Cahan*, 44 C.2d 434, 445, 282 P.2d 905 (1955).

The real danger in narrowing the scope of the Rule or eliminating it entirely is the impact it would have on our criminal justice system.

> When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. '[N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business

> it does not permit the judge to allow such iniquities to succeed.' *(Citation)* Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business." *People v. Cahan*, 44 C.2d 434, 445, 282 P.2d 905 (1955).

In the Amicus Brief filed by the Americans for Effective Law Enforcement, data is presented which allegedly proves that the police are following the edicts of the court governing the Fourth Amendment at least 84% of the time. On the other hand, the Amicus Brief filed by the State of Illinois argues that the rule should be eliminated because the police ignore the rule or are not aware of the guidelines set out by the court for police conduct. These arguments cancel each other out. With such inconclusive and inconsistent data at hand, certainly judicial conservatism would dictate that the Exclusionary Rule should not be eliminated or narrowed without more substantial corroboration.

Throughout the discussion of the problem, the tendency for those who are critical of the rule is to speak in terms of the "honest" citizens as opposed to the "criminals" or the "guilty."[24] As one commentator has noted,

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[24]See Petitioner's Opening Brief at 42.

> It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. Journal 319, 322 (1962).

This kind of dichotomy between the "honest" citizen and the "criminal" can only lead to emotional responses rather than rational ones. It should not be forgotten that it is the person with unpopular views, for example, who tests the constitutional right to free speech; it is the person who is prosecuted for the violation of some offense who tests the validity of the words that proclaim procedural due process in our society. As long as the discussion emphasizes that "honest, upright citizens" are on the one side and the law violator on the other, the only conclusion that can be arrived at is that these rights that protect the outcasts and unpopular within our society should be eliminated.

> The understandably impatient law-abiders, who approve official retribution without restraint against wrongdoers, do not visualize

> themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history. Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke L. Journal 319 at 319 (1962).

It is only a short step to the abolition of all our rights under the Bill of Rights if constitutional problems are placed in this framework since the only persons who directly test the protections are the pariahs of our society. Such a danger was recognized by this Court in *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *Id.*, at 635.

A number of alternatives have been suggested by the critics of the Exclusionary Rule.[25] However, there is no

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[25] See Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 University of Chicago Law Review 665 (1970), wherein it is suggested that criminal or tort liability, internal or external review procedures, the Civil Rights Act, and contempt of court proceedings are possible alternatives to explore.

evidence that any of these alternatives are effective. One problem is central to all these recommendations, i.e., the absence of any pressure to prosecute vigorously these alternatives. At least with the present rule, an individual who is charged with an offense will test the validity of the search or seizure if it violates the rules laid down by the courts. A salutary effect of this is that search and seizure issues are litigated and the boundaries and protections of the Fourth Amendment become rules of law enunciated by our courts.

Consider, for example, two ramifications of the alternatives suggested. It is often argued that some type of tort remedy should be developed to replace the Rule. In a criminal justice system where plea bargaining plays a preeminent role, it takes very little imagination to perceive that if the remedy is an effective one, the remedy will enter into the negotiation. If there has been an arguable violation of the Fourth Amendment, the officer's self-interest would be served by obtaining some kind of an agreement out of the accused that he not pursue the tort remedy in return for the lowering of the charge or dismissal of the complaint. This would, in turn, encourage over-charging of offenses to give the officer as much maneuverability as possible in these negotiations. The practical result of the theoretical idea of benefiting those individuals whose rights have been violated - the further corruption of the system with contempt for the police,

courts, and all involved felt by those who are brought into the system. The further loss of respect for our institutions by those in the society with whom it comes in contact would exacerbate the problems facing criminal law today.

Further, it is unrealistic to believe that the individual who has been found in possession of contraband, albeit by illegal police action, and has been sentenced, would turn around and sue the same individuals who are now his jailers for a violation of his Fourth Amendment rights during the arrest. The temptation of the police to discourage such a suit would be great and the methods of intimidation subtle but effective. Once again, the result would be the further corruption of our police, a growing disrespect for the state and its institutions, and an empty remedy for a citizen whose rights have been violated by the state.

It is folly to expect the powerless within the society to pursue remedies against the authorities since the poor often lack the resources, energy, time and knowledge to make alternatives complete remedies. At least at the present time, defense attorneys and public defenders who represent the indigent can raise these issues.

The courts of this land are still the foremost protectors of the constitutional rights of its citizens. If the Fourth Amendment is to have any meaning, it is clearly necessary that there be some

reasonable amount of judicial attention to questions concerning police practices. It is clear that the Exclusionary Rule does this.[26] For that reason alone, it should not be altered or abolished. Let us keep the Constitution as our blueprint for freedom and justice, not reduce it to the status of a document of value only for its historical interest.

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[26]See Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. Law, C. and Pol. Sci., 255, 260 (1961).

CONCLUSION

Amicus respectfully requests this Court to dismiss the Petition for Writ of Certiorari as improvidently granted since the decision rendered by the California Supreme Court rests on independent state grounds.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

v.

JUDITH H. KRIVDA and RODGER T. MINOR.

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

v.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF

OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). A copy of this opinion is set forth as Appendix A to the Petition for Writ of Certiorari.

The prior opinion of the California Court of Appeal, Second Appellate District, Division One is reported as *People v. Krivda*, 91 Cal. Rptr. 219 (1970). The Court of Appeal opinion was superseded when the California Supreme Court granted a hearing pursuant to Rule 28 of the California Rules of Court. Consequently the Court of Appeal opinion appears only in the unofficial reports. A copy of the Court of Appeal opinion is set forth as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. (Petn. for Cert., Apps. A & B) The Petition for Writ of Certiorari was filed November 12, 1971, and was granted April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to the street for the purpose of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to the comingling of the contraband with the trash of other persons?

2. Whether in any event, application of the exclusionary rule is constitutionally compelled under the circumstances of the present case?

CONSTITUTIONAL PROVISIONS INVOLVED

A. FEDERAL CONSTITUTION

United States Constitution, Article I, Section 9.

> "No Bill of Attainder or ex post facto law shall be passed."

United States Constitution, Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment IX:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

United States Constitution, Amendment XIV, Section 1 in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. CALIFORNIA CONSTITUTION

California Constitution, Article I, Section 19:

> "The right of the people to be secure in their persons, houses, *papers and effects,* against unreasonable seizures and searches shall not be violated and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

C. LOS ANGELES COUNTY ORDINANCES

ORD. NO. 5860 71-8608 Eff. 6-26-64

Chapter IX
Waste Collection and Transportation

Article 1. Definitions

Section 1601. Person.

"Person" means any individual, firm, co-partnership, corporation, municipality, district, or other political subdivision, or any other group or combination acting as a unit.

Section 1602. Public Agency.

"Public Agency" means and includes the Federal Government or any department or agency thereof, the State or any department or agency thereof, a county, city and county, city, public corporation, municipal corporation, or public district.

Section 1603. Truck.

"Truck" means any truck, trailer, semi-trailer, conveyance, or vehicle used to collect, haul or transport

garbage, rubbish, or industrial waste upon or along the public highways.

Article 2. License Required

Section 1611 (8608 6-26-64) Waste Collector License Required.

Every person operating one or more trucks in the business of collecting, transporting, conveying, hauling, and disposing of any rubbish, garbage, or industrial waste from the property where such materials originate to another location, for transfer, salvage, or disposal shall first procure a license and pay an annual license fee for each truck of:

(a) Forty-one dollars for the first year.

(b) Twenty-Seven Dollars for each annual renewal.

Section 1612 (8608 6-26-64) Waste Hauler License Required.

Every person operating one or more trucks upon or along any public highway in the unincorporated area of the County who is transporting, conveying, hauling, or disposing of rubbish, garbage, or industrial waste but who is not required by Section 1611 to obtain a Waste Collector's License, and who is not otherwise exempted from the provisions of this Chapter, shall first procure a Waste Hauler's License and pay an annual license fee of twenty-one dollars for each such truck not so licensed.

Section 1613. Householders' Exclusion.

Householders hauling occasional loads of manure or rubbish not containing garbage from their own premises to a legal point of disposal shall be excepted from the provisions of this article.

Section 1618. Bond.

The Tax Collector shall not issue a Waste Collector's license or a Waste Hauler's license until the applicant files with the Tax Collector a cash bond or a corporate surety bond in the sum of two thousand five hundred dollars conditioned that:

(a) ...

(b) ...

(c) The applicant shall comply with all the terms and conditions of any permit, license, or exception granted, and with all laws, statutes, ordinances and regulations, relating to the collection or transportation of garbage, rubbish, or industrial waste.

Article 4. Waste Collectors

Section 1687. Hours of Collection.

The collector shall not collect garbage or combustible or noncombustible rubbish within a residential area between the night time hours of 10:00 P.M. and 6 o'clock A.M. the next day, provided, however, that the Health Officer may waive such requirement when necessitated by conditions beyond the control of the collector.

Section 1688. Vehicles.

All trucks, trailers, and other conveyances or equipment used to collect garbage or rubbish shall at all times be kept clean, in good repair, and well painted, to the satisfaction of the Health Officer.

The Collector's name or firm name, together with his phone number, shall be printed or painted in legible letters, not less than three (3) inches in height, on both

sides of all trucks and conveyances used to collect garbage and rubbish.

Section 1689. Care of Containers.

All containers shall be replaced where found. Containers and lids shall not be deposited in the street or on adjoining property.

The collector, his agents and employees, shall not throw garbage or rubbish containers from the truck to the pavement, or in any other way break or damage or roughly handle the same.

Section 1706. Containers to be placed at Curb or Alley.

The collector may agree with the occupant of a dwelling or other building to collect garbage and rubbish from the rear yard or other portion of the property. The Health Officer may direct or permit the collection of garbage or rubbish from a particular location on or near the property. The collector shall collect all garbage and rubbish as so agreed to, directed or permitted. Otherwise, the collector shall collect all garbage and rubbish from the curb along the street in front of each dwelling or human habitation, if no paved alley exists in the rear of such properties, or such alley is:

(a) A blind alley;

(b) An alley less than fifteen (15) feet wide;

(c) An alley that is "L" or "T" shaped and not wide enough to be safe for collection trucks to turn without damage to them or to adjacent improvements on private property;

(d) An alley the surface of which is of such material as to endanger the safety or the convenient operation of the trucks at all seasons of the year.

Otherwise, the collector shall collect all garbage or rubbish from the paved alley, in which case, the garbage and rubbish to be collected shall be placed on the premises within two feet of the rear property line, if physically possible and if freely accessible from the alley; if not, then off the premises within two feet of the rear property line.

Section 1707. Containers – At Place of Collection.

A person shall not place any rubbish, or any container containing garbage or rubbish, or both, at the place of collection before six o'clock P.M. of the day preceding the scheduled collection of the said garbage or rubbish, or both, or leave any such container at the place of collection after eight o'clock P.M. on the day of actual collection, or more than two hours after actual collection, whichever is later.

Section 1708. (8707 11-6-64) *Containers – Commercial and Industrial.*

Every waste collector who owns, rents or controls any container, bin or other equipment used for the storage of garbage, industrial waste, market refuse or rubbish shall:

(a) Place and maintain on the outside of such container, bin or other equipment, in legible letters and numerals not less than one inch in height such waste collector's name or firm name, and telephone number.

(b) At all times keep in good repair and maintain in a clean and sanitary condition such container, bin, or other equipment to the satisfaction of the Health Officer.

Section 1709. (8707 11-6-64) *Prohibition.*

A person other than the waste collector having charge thereof, shall not deface, alter, remove or obliterate any

identification placed on any container, bin or other equipment pursuant to the provisions of this article.

Section 1710. (8707 11-6-64) *Tampering.*

A person not having the authority to do so, shall not tamper with, injure, destroy, or remove any container, bin, or other equipment used for the storage of garbage, industrial waste, market refuse, or rubbish.

D. LOS ANGELES MUNICIPAL CODE

Chapter VI, Article 6

Section 66.00. (Amended by Ord. No. 118,900, Eff. 6/3/61) –

Definitions.

For the purpose of this article, the following words and phrases are defined and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning:

1. REFUSE shall mean any combination of rubbish and garbage.

(a) HOUSEHOLD REFUSE shall mean any combination of rubbish and garbage generated at a private residence or that part of any place used as a private residence except a hotel, motel or tourist camp as those places are defined in this Article.

(b) COMMERCIAL REFUSE shall mean either rubbish or any combination of rubbish and garbage generated at such hotel, motel, tourist camp or place or part thereof used other than as a private residence.

2. GARBAGE shall mean either animal or vegetable residue or any combination thereof resulting from any

use of a food, beverage or mixture of food and beverage except food plant waste, market waste or dead animals.

(a) HOUSEHOLD GARBAGE shall mean all garbage other than commercial garbage.

(b) COMMERCIAL GARBAGE shall mean garbage resulting from the preparation or other processing of a food, beverage or mixture thereof for consumption on the premises of any place other than a private residence.

(c) FOOD PLANT WASTE shall mean either animal or vegetable matter or any combination thereof resulting from the manufacture, production or other creation of a food, beverage or mixture thereof for any commercial use, elsewhere than at the place where manufactured, produced or otherwise created.

(d) MARKET WASTE shall mean either animal or vegetable matter or any combination thereof which accumulates for disposal at any place other than the place of ultimate consumption by reason of any change in its form or condition during the process of marketing such matter.

3. RUBBISH shall mean any combination of combustible, non-combustible or building material rubbish.

(a) COMBUSTIBLE RUBBISH shall mean paper and paper products; cloth and clothing, carpets, linoleum and similar floor coverings; feathers; grass and tree and shrubbery trimmings; leather and leather products; rubber and rubber products; plastics; straw and other combustible packing; wood and wood products; and similar articles that will

incinerate through contact with flames of ordinary temperature.

(b) NON-COMBUSTIBLE RUBBISH shall mean ashes, bottles, broken crockery, glass, metals, construction material other than building material rubbish, and other similar household substances that will not incinerate through contact with flames or ordinary temperature.

(i) ASHES shall mean that non-combustible rubbish which is the solid residue from the thorough burning of combustible substances.

(ii) METALS shall mean that non-combustible rubbish which is principally made of metal such as tin cans, toys and other similar items designated as such by the Board.

(c) BUILDING MATERIAL RUBBISH shall mean either any unusual quantity, as further defined by the Board by rule or regulation, of noncombustible rubbish such as rock, gravel, brick, plaster, plasterboard, tile, mortar or concrete or any unusual quantity of combustible rubbish, similarly defined, such as materials resulting from building construction, alteration, repair or improvement or any combination of such noncombustible and such combustible rubbish.

4. SALVAGE shall mean any item of refuse designated by the Board and approved by the Council as having sufficient value to warrant the sale thereof.

5. CONTAINER shall mean any receptacle used or intended to be used for storing either rubbish, garbage or refuse for collection.

6. HOTEL shall mean a residential building designed or used for or containing six or more guest rooms or suites of rooms, but not including any institution in which human beings are housed or detained under legal restraint.

7. MOTEL shall mean a group of attached or detached buildings containing individual sleeping or living units, designed for or used temporarily by automobile tourists or transients, with garage attached or parking space conveniently located to each unit, commonly referred to as auto courts, motels, motor lodges, tourist courts and similar designations.

8. TOURIST CAMP shall mean any place, area or tract of land upon which are located two or more cabins, trailer coaches, automobile house trailers, automobiles used for sleeping purposes, or other camping outfits commonly referred to as tourist camp, trailer park, and similar designations.

Section 66.00.1. (Amended by Ord. No. 118,900, Eff. 6/3/61) – *Refuse Service - Refuse Collection.*

(a) (Amended by Ord. No. 127,743, Eff. 7/24/64.) It is the policy of the City of Los Angeles to provide, subject to the availability of funds therefor, for the collection by municipal forces of household refuse, commercial garbage and dead animals, but not to provide for such collection of commercial refuse, food plant waste, market waste or building material rubbish. It is further the policy of the City of Los Angeles:

1. To collect household refuse, including metals, combined in one or more containers, by a single pick-up on a regularly scheduled basis;

2. To collect commercial garbage on a regularly scheduled basis as a public health measure, provided, however, that any producer of such garbage may contract directly with others for the collection of such garbage subject to the issuance of the necessary permit by the Board in accordance with this Code;

3. To collect dead animals on call as the need occurs, including such removal from commercial establishments only when death of such animal or fowl is from natural causes, or accidental, or through intentional destruction for humane reasons to prevent suffering on the part of the animal or fowl from sickness or injury; and provided that the animal or fowl is not killed as the result of the regular or routine operation of any commercial enterprise, thereby intentionally creating the carcasses.

(b) (Amended by Ord. No. 127,743, Eff. 7/24/64.) It is the policy of the City of Los Angeles to dispose of refuse collected by the City, including metals, in land reclamation sites owned and operated or otherwise controlled by the City or in City-owned incinerators when economically feasible, or by contractual arrangement where appropriate. Contractual arrangements involving consideration in excess of $5,000.00 shall be approved by the Council by ordinance or resolution, except in the case of an emergency as determined by the Director of the Bureau of Sanitation.

(c) Incinerators and land reclamation sites operated by the City shall be available for public use subject to the following conditions:

1. That the Board, after fully considering all the facts, determines that there exists at a particular incinerator or land reclamation site a capacity for refuse disposal in excess of that needed by the City;

2. That the Board, after considering the size and capacity of a land reclamation site, the location in which it is situated, the nature and condition of the roads giving access thereto, and other and similar considerations, determines, subject to the approval by the Council, that the use for public dumping purposes of a particular land reclamation site is in the public interest;

3. That the Board, subject to approval by the Council, shall fix chartes for the public use of incinerators and land reclamation sites operated by the City in such amounts as are sufficient to ensure that each use will bear a proportionate share of the maintenance amortization, operation, handling and other costs. The Council may by resolution, either upon its own motion or upon recommendation of the Board, increase or decrease charges in order to meet changing cost conditions.

(d) Land reclamation sites owned by the City shall be devoted upon completion of reclamation to such use as the Council shall determine.

(e) The Board of Public Works shall adopte rules and regulations, not inconsistent with this Article, to effectuate the purposes and intent of this Section and the further provisions of this Article. Any such rule or regulation pertaining to refuse collection shall be approved by the Council.

(f) (Added by Ord. No. 125,989, Eff. 12/16/63.) The Board of Public Works, subject to the approval of the Council in each instance by resolution, may from time to time institute and conduct one or more programs within an area or areas of the City designated by the Board whereby household refuse including metals and other salvage is combined in one or moré containers for a single pickup on a regularly scheduled basis for the purpose of studying the costs to the City of such program or programs compared with the costs to the City under the collection policies set forth in Subsection (a) of this Section.

Section 66.01. *Garbage Collection.*

No person shall remove or convey any garbage upon or along any street in this City; provided, however, that the provisions of this section shall not apply to any person in the employ of this City who shall be assigned by the Board to the work of garbage disposal or to any person with whom this City has entered into, or may hereafter enter into, a contract for the collection, removal and disposal of garbage or to any employee of such contractor during the time his contract shall be in force, and provided further that refuse collection and disposal contractors serving neighboring municipalities, County garbage district, State or Federal institutions, or any person in the employ of any such governmental agency may haul garbage over the streets of this City after having first obtained apermit therefor from the Board of Public Works.

Section 66.01.1 *Food-Plant Waste - Transportation - Permit Required.*

No person shall remove or convey any food-plant waste upon or along any street in this City without a permit therefor from the Board of Public Works; each applicant for a permit hereunder shall agree to comply with such rules and regulations as the Board may establish for the hauling of such waste.

Section 66.02. *Garbage Containers.*

(a) GARBAGE RECEPTACLES - SPECIFICATIONS. It shall be the duty of every owner, manager, or person in possession, charge or control of any boarding house, restaurant, hotel, apartment or eating house, and every person occupying a dwelling or flat within this City to provide, and at all times to keep, portable vessels, tanks or receptacles for holding garbage. Each vessel, tank or receptacle shall be constructed water tight and so constructed as to contain not less than three or more than sixteen gallons and provided with handles and a tight fitting cover. Each such vessel, tank or receptacle and cover shall be made of such materials as may be approved for such use by the Board and by the City Council. The cover shall not be removed except when necessary to place garbage therein or to remove garbage therefrom. Each vessel, tank or receptacle and its cover shall be kept cleaned on the outside from accumulating grease and decomposing material.

(b) GARBAGE RECEPTACLES - CLEANING. Each vessel, tank, or receptacle used by an employee of the City, assigned to the work of garbage disposal or by a duly authorized contractor in the removal of garbage from premises to the transporting receptacle, shall have the grease and other adherent material removed at least

once daily and be further cleaned by immersion through an approved disinfecting solution or by the application of live steam.

(c) GARBAGE RECEPTACLES - LOCATION OF. Each can, vessel, tank or receptacle provided by the owner, manager, or person in possession, charge or control of any boarding house, restaurant, hotel, apartment or eating house or a person occupying a dwelling or flat, shall be placed for collection on the curb in front of the premises for which it is provided except where the premises abut upon an alley conforming to the following conditions;

1. The alley be a through alley so that refuse trucks need not back out of it;

2. The alley be not less than 15 feet wide;

3. If the alley be L or T-shaped, the turns be wide enough to be safe for the refuse collection trucks to turn without damage to them or to adjacent improvements on private property;

4. The surface of the alley be of such material as to insure reasonable safety for the convenient operation of refuse trucks at all seasons of the year; in which case the can, vessel, tank or receptacle shall be placed on the premises within 2 feet of the rear property line thereof, if physically possible and if freely accessible from the alley; if not, then off the premises within 2 feet of the rear property line.

(d) GARBAGE RECEPTACLES - TIME FOR SETTING OUT AND REMOVAL OF. No owner, manager or person in possession, charge or control of any boarding house, restaurant, hotel, apartment house or eating house, located in a district where garbage is scheduled to be collected between the house of 6 A.M. and 6 P.M., or

person occupying a dwelling or flat located in such district, shall place any can, vessel, tank or receptacle containing garbage at the place of collection before 6 P.M. of the day preceding the scheduled collection of said garbage, nor leave any such can, vessel, tank or receptacle at the place of collection after 8 P.M. of the day of actual collection.

No owner, manager or person in possession, charge or control of any boarding house, restaurant, hotel, apartment house or eating house, located in a district where garbage is scheduled to be collected between the hours of 6 P.M. and 6 A.M., or person occupying a dwelling or flat located in such district, shall place any can, vessel, tank or receptacle containing garbage at the place of collection before 5 P.M. of the scheduled night of collection of said garbage, nor leave any such can, vessel, tank or receptacle at the place of collection after 8 A.M. of the day following the night of actual collection.

(e) (Amended by Ord. No. 128,102, Eff. 9/18/64) GARBAGE RECEPTACLES - COMBINED REFUSE COLLECTION. Notwithstanding other provisions of this Code to the contrary, when garbage is collected combined with other refuse, it shall be thoroughly drained and securely wrapped. Such drained and wrapped garbage shall be stored in metal, water-tight containers, or their equivalent, equipped with tight-fitting covers, and otherwise in compliance with applicable provisions of Ordinance No. 127,507.

Section 66.03 *Garbage Containers - Tampering with.*

No person, other than the owner thereof, his agents or employees, or an officer or employee of this city, or any person holding a contract with this city for the collection of garbage, or his agents or employees authorized for

such purposes, shall tamper or meddle with any vessel, tank or receptacle for holding garbage or the contents thereof, or remove the contents of any such vessel, tank or receptacle, or remove any such vessel, tank or receptacle from the location where the same shall have been placed by the owner thereof or his agent, regardless of whether or not the vessel, tank or receptacle conforms to the requirements or descriptions set forth in Section 66.02.

No person shall place any substance other than garbage in any such vessel, tank or receptacle.

Section 66.13. *Combustible Rubbish and Market Refuse–Place of Disposal*

(a) Any combustible rubbish or market refuse conveyed upon or along any street for disposal shall be disposed of at a lawful place; and if such is to be disposed of within the City, it shall be either at a municipal incinerator operated by the City or at a duly authorized public dump operated under permit from the Board or a land reclamation site operated by the City. Either combustible rubbish or market refuse having a salvage value may be segregated from other such material prior to conveyance to a municipal incinerator or land reclamation site and the salvaged material disposed of at any lawful place. (Amended by Ord. No. 108,011, Eff. 10/1/56).

(b) No person having control or possession of any business establishment, building, property or premises as owner or otherwise, shall remove or have removed, or convey or have conveyed any combustible rubbish or market refuse originating therein or thereon to any place for its disposal other than as provided in the preceding subsection.

(c) No person shall deposit any combustible rubbish or market refuse within this City upon or in any street, or in the Los Angeles River or any other stream or watercourse or in the beds thereof, or upon any public or private premises except at a municipal incinerator, land reclamation site or public dump designated by this section. (Amended by Ord. No. 108,011, Eff. 10/1/56.)

(d) No person in charge of any municipal incinerator or land reclamation site operated by the City, or any other person connected directly or indirectly therewith, shall charge for the disposal of rubbish or market refuse any rates other than those established in accordance with Sec. 66.00.1(d). (Added by Ord. No. 108,011, Eff. 10/1/56).

Section 66.14. *Incinerator Conditions. (Title Amended by Ord. No. 108,011, Eff. 10/1/56.)*

(a) (Repealed by Ord. No. 108,011, Eff. 10/1/56.)

(b) (Repealed by Ord. No. 108,011, Eff. 10/1/56.)

(c) Materials brought to any municipal incinerator for disposal shall not exceed the following dimensions for individual pieces:

1. Solid material, four feet in length by one and one-half feet in any other dimension.

2. Material capable of being compressed or crushed, such as barrels, packing cases and the like, six feet in length by five feet in any other dimension.

(d) All material brought to any municipal incinerator for disposal shall be ready for immediate dumping, and no person shall salvage or attempt to salvage any material at any municipal incinerator.

(e) Vehicles bringing material to any municipal incinerator conforming to the following provisions of this subsection will be given preference in the prompt assignment of unloading positions at the incinerator:

1. Vehicles of the type designed to dump from the rear by the mechanical elevation of the front of the body; or

2. Vehicles equipped with an inner removable body or a removable lining of canvas, woven rope or wire or other flexible material securely fastened to the truck body at the rear and free at the front of the truck body, so that the load can be dumped by elevation of the free end of the lining by mechanical apparatus such as hooks, cable and winches provided at any municipal incinerator.

(f) Material not conforming, or brought to any municipal incinerator by vehicles not conforming, or sought to be discharged thereat by equipment not conforming to the provisions of this section, need not be accepted.

Section 66.15 *(Amended by Ord. No. 140,388, Eff. 6/28/70.) Combustible Rubbish - Public Dump.*

It shall be unlawful to burn combustible rubbish on private property or upon public dumps within the City of Los Angeles.

EXCEPTION:

The regulations in this section shall not apply to combustible tree, shrub and grass cuttings and other household rubbish normally accumulated on the premises by the owner or occupant and disposed of in accordance

with Municipal Code requirements governing the use of household incinerators and open burning.

The Board is authorized to issue revocable permits for the operation of "Fill and Cover" dumps upon the payment of an annual fee of $1,650.00 if the Board finds that such dumps are in the public interest.

Permits for the operation of "Fill and Cover" dumps may be issued by the Board subsequent to its investigation of each particular site. The Board shall require satisfactory and nuisance-free operation of each such dump.

Each application for the operation of such "Fill and Cover" dumps shall be referred to the Board of Water and Power Commissioners for recommendation. Any conditions recommended by said Board shall be included in any permit granted by the Board of Public Works. Should said Board of Water and Power Commissioners recommend denial of such application for permit, good cause being shown, the same shall be denied by said Board of Public Works.

The Board is hereby authorized and empowered to adopt such rules and regulations and impose such other conditions as the Board deems necessary to carry out the purpose of this section.

Section 66.16. *Permits Not Transferable.*

No permit granted pursuant to the provisions of Sections 66.08 to 66.15, inclusive, shall be assigned or transferred, nor shall such permit be issued to extend to a later date than the first of January next succeeding the date of its issuance.

Section 66.18. *Non-Combustible Rubbish - Permit.*

No person shall remove or convey any non-combustible rubbish upon or along any public street without first filing a written application and obtaining a written permit from the Board so to do.

The provisions of this section shall not apply to any person in the employ of the Board or with whom the City has entered into or may hereafter enter into a contract for the removal, disposal and conveyance of non-combustible rubbish, or to any employee of such contractor during the time that the contract is in force.

Section 66.21. *Permits Not Transferable.*

No permit issued pursuant to Section 66.18 shall be assigned or transferred.

Section 66.28. *(Amended by Ord. No. 124,024, Eff. 3/14/63.) Containers - Tampering with.*

No person, other than the owner thereof, his agents or employees, or an officer or employee of this City or any person holding a contract with this City for the collection or disposal of refuse, his agents or employees authorized for such purposes, shall tamper or meddle with any refuse or rubbish container or the contents thereof, or remove the contents of any such container or remove any such container, from the location where the same shall have been placed by the owner thereof or his agent, regardless of whether or not such container conforms to the requirements or description set forth in the rules and regulations of the Board.

Section 66.29. *Employees - Use of Rubbish.*

No employee of this City shall remove or dispose of, for said employee's individual use or benefit, any of the contents of any vessel, tank or receptacle used for the

collection, removal or disposal of rubbish. (Amended by Ord. No. 108,011, Eff. 10/1/56.)

STATEMENT OF THE CASE

A. HISTORY OF THE CASE

On September 18, 1968, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging respondents Judith H. Krivda and Rodger T. Minor with possession of marijuana in violation of section 11530 of the California Health and Safety Code. (App. p. 2.) Respondents' motion to set aside the information pursuant to California Penal Code section 995 was denied. (App. p. 3.) Respondents thereafter entered pleas of not guilty (App. p. 4.)

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing[1] and on further testimony adduced at a hearing on that motion.[2] (App. pp. 5-6) The motion to suppress evidence was denied at the conclusion of the hearing held on October 24, 1969. (App. p. 6.) On December 12, 1969, the trial court, with the same judge presiding, permitted the respondents to reopen their motion to suppress evidence. On the basis of the same evidence and arguments previously presented, the trial court reversed its ruling and granted the motion to suppress evidence. On petitioners' representation that

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[1]The Reporter's Transcript of the preliminary examination is set forth verbatim at pages 10-76 of the Appendix.

[2]The transcript of the additional testimony presented at the hearing on the motion to suppress evidence is set forth at pages 77-83 of the Appendix.

no other additional evidence existed, and on the court's own motion, the action was dismissed in the interests of justice. (App. p. 7.)

Petitioner appealed to the California Court of Appeal, pursuant to California Penal Code section 1238, subdivision 7,[3] from the order of the superior court suppressing evidence and dismissing this cause. (App. p. 8.) On November 16, 1970, Division One of the California Court of Appeals for the Second Appellate District reversed the judgment and order of the superior court in an opinion set forth in Appendix C to the Petition for Writ of Certiorari.

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). (*See* App. A, Petn. for Cert.) On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* App. B. Petn. for Cert.)

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[3]Penal Code section 1238 provides:

"An appeal may be taken by the people from any of the following:

". . . .

"7. An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. . . ."

B. STATEMENT OF FACTS

On July 1, 1968, Officer Stephen C. Gates of the Los Angeles Police Department received a telephone call from an anonymous female informant who told him that "Rodger" and "Judy" were engaging in narcotic activities, *i.e.*, smoking marijuana and injecting methedrine. (App. pp. 12-13.) The informant indicated that there were many sex parties at their 1901 Nolden residence in Los Angeles and that a Lesbian named "Frankie" was living there. The informant also indicated that both Rodger and Judy were injecting the two children who resided at that location with methedrine. The informant said that she had heard this from Judy, who said she enjoyed the effects of methedrine and that she also wanted her children to experience the feeling of being under the influence of methedrine. (App. pp. 12-13.)

After receiving this information, Officer Gates and his partner, Officer William Marsden, located the address and observed two young female children in front of the premises. Officer Gates then ran a utility check which indicated that Judy Krivda was paying for the utilities at 1901 Nolden. (App. pp. 13, 48.) Officer Gates also checked criminal records with the Los Angeles Police Department and determined that three individuals with the last name of Krivda had been arrested in Los Angeles. Upon further investigation Officer Gates discovered that one of these individuals, Edward Joseph Krivda, had a wife named Judy. (App. p. 13.) The records also indicated that Edward Joseph Krivda had been arrested for possession of dangerous drugs for sale and also sale of dangerous drugs. (App. p. 14.)

At about 11 a.m. on July 9, 1968, Officer Gates and his partner returned to the vicinity of 1901 Nolden. The

residence at that address was a single family dwelling. (App. p. 14.) From their vantage point, the officers observed several trash barrels directly in front of the house at 1901 Nolden. (App. pp. 14-15, 17.) The trash barrels were in the parkway adjacent to the sidewalk, thirty to forty yards from the house. (App. pp. 17, 28.) The home adjacent to 1901 Nolden was approximately twenty feet down the hill. (App. p. 15.)

The officers observed refuse collectors approximately a block away from the house at 1901 Nolden. (App. p. 14.) Officer Gates stopped the collectors approximately half a block west of the premises. (App. pp. 14, 18.) After identifying himself as a police officer, Officer Gates told the trash collectors that he was interested in looking at the contents of the trash barrels in front of 1901 Nolden. (App. pp. 14-18.) He asked them to empty the well of their truck, to pick up the trash in front of the house at 1901 Nolden, and then to meet Officer Gates and his partner approximately one block north of the location. (App. pp. 14, 18, 70.)

Officer Gates observed the refuse collectors drive their truck to the front of the premises at 1901 Nolden. He observed them go to the back of the truck, take the trash barrels, place the contents of the trash barrels in the well, and then drive north to where he and Officer Marsden were waiting. Officer Gates had examined the well of the trash truck prior to the emptying of these specific garbage cans into the well. There had been no refuse at all in the well prior to the emptying of the garbage cans at 1901 Nolden. Officer Gates did not observe the collectors empty any other garbage cans into the well of the truck between the time they placed the trash from those cans into the well and the time the truck arrived at his location. (App. pp. 18-19.)

When Officer Gates examined the contents of the well of the trash truck, he observed approximately five brown paper sacks among the refuse. Upon examining the sacks, he found that they contained what appeared to be marijuana debris and marijuana seeds. (App. p. 19.) In one of the bags, Officer Gates found approximately four to six partially burned marijuana cigarettes. (App. pp. 20, 57.) Also among the contents in the well of the trash truck, Officer Gates found an envelope with the name Edward Krivda and the address 1901 Nolden, a hand-written letter with the name Frankie mentioned in it, and a three by five card with the names Rodger and Judy written on it. (App. pp. 20-21.)

After Officer Gates had examined the contents of the well of the trash truck, he went back to his former vantage point. There he observed respondent Rodger Minor come from the premises at 1901 Nolden and pick up the trash barrel which had contained the marijuana debris. Respondent Minor, wearing only a towel around his waist, took the trash barrels to the front porch of the house. (App. pp. 21-22, 81.)

At this point Officer Gates and his partner requested the assistance of a uniformed sergeant. The uniformed officer and Officer Gates approached the front of the premises while Officer Marsden positioned himself at the rear. When respondent Minor met Officer Gates at the front door, Officer Gates placed him under arrest for possession of marijuana. (App. pp. 22, 40, 43.) The officers then effected entry, discovered respondent Krivda in the residence, and recovered additional marijuana and paraphernalia. (App. pp. 23-25, 46.)

SUMMARY OF ARGUMENT AND CONTENTIONS OF RESPONDENTS; RESPONSE TO CONTENTIONS OF PETITIONERS

The statement of facts set forth by petitioner in its Petition for Certiorari (Pages 6-7) and in its Opening Brief (Pages 5-8), appears to adequately portray the background of the case, with the emphasized fact that an untested, unreliable, anonymous informant placed a telephone call to Los Angeles Police concerning respondents (App. 12). This phone call was the precursive impetus to a surveillance of respondents home at 1901 Nolden, Los Angeles, California. That surveillance gleaned nothing save the observation that two female children periodically played in the yard of respondents (App. 13).

Apparently, as an afterthought, Los Angeles Police decided to intercept the garbage truck as it approached 1901 Nolden, stopping it before one of the homes on the street. No information was in the possession of the police which in any way indicated that Respondents' garbage can was utilized by them to dispose of contraband or in any other way played a role in the lives of respondents save to dispose of routine refuse.

It is clear that petitioners could never have obtained either a warrant of search or a warrant of arrest for respondents based on the anonymous "tip" of an untested, unreliable, anonymous telephonic informant. First, the anonymous informant was prima facie unreliable; second, nothing was proffered by the informant to indicate that he spoke with personal knowledge of the events alleged to have occurred at 1901 Nolden, Los Angeles, California. As such, no search warrant or arrest warrant could possibly have issued under the deicisions of

this Honorable Court, *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 506 (1971) or under the decisions of the Supreme Court of California, *People v. Hamilton*, 71 C.2d 176 (1969), *Halpin v. Superior Court of San Bernardino County*, 6 Cal.3d 885 (1972).

It appears that petitioner California seeks to accomplish without a search warrant what it could not accomplish had it sought a search warrant.

Respondents assert the following contentions and argument, which will be developed and supported by federal and state authorities:

I.

AS TO PETITIONER'S FIRST QUESTION PRESENTED:

A. Respondents contend that they had a reasonable expectation of privacy in their trash container against police initiated search and seizure based upon several theories:

1. In general, respondents contend that the average citizen depositing refuse in a trash can reasonably believes that said refuse will be picked up by garbage haulers and mixed indistinguishably with other refuse and taken shortly to a dump where it is either burned, or as is its fate in Los Angeles, California, plowed under to form the basis of fill for housing developments. If respondents are argued to have "abandoned" their trash, they have given it up solely to garbage haulers with the expectation they will carry it straight to a regulated disposal area. Respondents contend that garbage haulers are not reasonably believed to be the agents of police and do not

usually have the time or inclination to sift through brown opaque bags containing garbage to look for contraband within the meaning of *Stoner v. California*, 376 U.S. 483 (1964) and *Chapman v. United States*, 365 U.S. 610 (1961).

2. Mathematically, respondents contend that the law of probability suggests that indiscriminate searching of the nation's 'garbage cans for contraband is a futile endeavor and, therefore, not an occurrence of reasonable expectation. The ratio of police to garbage cans is minuscule and therefore, the use of police manpower for such purposes would be neither logical nor workable as a crime detection scheme. Based on sheer statistics and mathematical probability, the likelihood of locating contraband in a given can in a given city on a given day is antithetical to a logical contention that such searches and seizures are reasonable. Indeed, the reasonable expectation is the opposite—to wit, a given can will be immune from police search on a given day. Consideration by a citizen of mathematics and scientific fact decrees a reasonable expectation of privacy and complete immunity from search in this manner.

3. Respondents contend that local Los Angeles City and County ordinances *FORBID* the collection, tampering or pick-up of trash and garbage by any other person except licensed and bonded collectors, and respondents thereupon base one of their contentions that it is unreasonable to presume that these licensed and bonded collectors would violate these ordinances by allowing police search and seizure of and from the garbage. Further, it is unreasonable to believe the garbage haulers would themselves become agents of the police to aid in the scheme of search and seizure within the meaning of

Stoner v. California, 376 U.S. 483 (1964) and *Chapman v. United States*, 365 U.S. 610 (1961).

4. Respondents, governed by these same ordinances, contend that they were required to dispose of their trash in a certain manner in order to comply with the law by placing said refuse in cans at curbside just prior to pick-up by licensed haulers in licensed trucks. Respondents moved their trash cans to curbside, away from, but contiguous to their home and environs, solely because they were compelled to so do within the meaning of Sections 1706 of the Los Angeles County Ordinances and 66.02(c) of the Municipal Codes of Los Angeles.

Respondents were entitled to, and did, reasonably rely on the existing Los Angeles County and Municipal garbage collection statutes in that they consequently and reasonably expected that their garbage can and its contents would remain private and would not be subject to tampering by anyone, and that when picked up, would be hauled to a dump and indistinguishably and anonymously disposed of, within the meaning of Sections 17.10 of the Los Angeles County Ordinances and 66.03 and 66.28 of the Municipal Codes of Los Angeles.

In *Mancusi v. De Forte*, 392 U.S. 368, this Court alludes to a "reasonable expectation of freedom from governmental intrusion". Respondents' contentions as to protections provided them by the local garbage ordinances, within the meaning of the Ninth and Tenth Amendments to the United States Constitution are exactly founded upon such reasonable expectation of freedom.

(5) a. Respondents contend that they are entitled to privacy in their trash cans and the contents thereof, and that they sought to maintain privacy in their refuse in

probably the only reasonable way available to them. They placed their refuse in brown opaque paper bags which they then placed in their private, covered garbage container within their home, and on its porch, moving the can to curbside only immediately before the scheduled pick-up. Under California law, a search warrant is required to search into closed opaque containers, within the meaning of key decisions of the California Supreme Court.

> "It is inherently impossible for the contents of a closed, opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant. . . ." *People v McGrew*, 1 Cal. 3d 404, 410. (See also *People v Marshall*, 69 Cal. 2d 51, 59.)

Garbage cans remain the property of the citizen, Section 66.02 of the Los Angeles Municipal Codes, and are to be returned to the citizen's home subsequent to being emptied by the trash collectors. No one would imagine that a citizen gives up his rights to ownership of his trash containers all or in part, to anyone, when he puts out his trash. The trash container, therefore, could be viewed as a "portable" part of the house itself–stretched from the curtilage for the temporary purpose of garbage disposal.

While the cited ordinances prohibit anyone but licensed garbage collectors from tampering with one's trash, it is clear that the owner of the trash container himself could, at any time, rummage through his own trash container, even after he has placed it at curbside, to, say, retrieve something discarded in error. It could not be reasonably argued that he would have to return the trash container to his own yard in order to look through it for such a purpose. No doubt, one of the reasons for the

enactment of ordinances preventing tampering is to allow such security to the trash disposing citizen.

This right of a citizen to retrieve items from his own trash would, as a practical matter, end when his trash had been commingled with the trash of others in the trash truck. Not only would it be unwise from a public health standpoint to permit a citizen to wallow around in a mass of other people's garbage, (assuming a citizen who could tolerate such a search from a personal standpoint), but it would interfere with the timely disposal of the trash of others by interfering with the work schedule of the garbage haulers. Furthermore, Respondents contend, it would be an impermissible invasion of the right of privacy of other citizens, presumably his neighbors, were he permitted to make such a search.

It would seem then, that a citizen reasonably expects that his trash will be his own until such time as it is comingled.

b. Respondents did not reasonably "accept the risk" that trash collectors would cooperate with police in search of their trash cans. In particular, Respondents in no way "confided" their "wrongdoing" to trash collectors, for the obvious and prima facie reason that the trash collectors were oblivious of anything concerning respondents or their activities even presumably when the police made demand for their cooperation in searching respondents' trash. In this sense, *United States v. White*, 401 U.S. 745 (1971) and *Massiah v. United States*, 377 U.S. 201 (1964) are inapposite. See also *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

c. Respondents contend that this Court has recognized that the intimate facts and activities of the marital bedroom and the marriage relationship, as it affects birth

control and contraceptives, should be protected under the concept of right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965). This Court said:

> "... would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship...."

Respondents suggest that a married couple should likewise be protected in their garbage should they wish to conveniently and privately dispose of birth control materials via this means. If one thing is protected in garbage, all things should be as well, especially if wrapped in opaque coverings for disposal.

B. Further, respondents argue and contend that under such decisions of the Supreme Court of the United States as *Cooper v. California* (1967), 386 U.S. 58, the Supreme Courts of the states and the state legislatures may create more stringent Fourth Amendment regulations than required by the Federal Constitution. This the Supreme Court of California has done in *People v. Edwards*, 71 Cal.2d 1096 (1970) and *People v. Krivda*, 5 Cal.3d 357 (1971); see also *People v. Martin*, 45 Cal.2d 755 (1955), and *Kaplan v. Superior Court*, 5 Cal.3d 525 (1971).

C. In addition, respondents argue and contend that the decision of the Supreme Court of California in *People v. Krivda*, 5 Cal.3d 357 (1971) is based upon an independent and adequate state ground, unrelated to federal Fourth Amendment violations, in that municipal and county ordinances preclude such garbage can searches and seizures by unlicensed and unbonded personnel. As such, all recent decisions of this Honorable Court preclude this Court's assumption of jurisdiction to

even consider any alleged Federal question within the meaning of *Johnson v. New Jersey*, 384 U.S. 719 (1966) and *Minnesota v. National Tea*, 309 U.S. 551 (1940), as well as other similar authority. Thus, while there may be no right of privacy in abandoned property in general, the garbage of L.A. County is highly regulated, whether such garbage is deemed to be "abandoned" or not.

D. Respondents contend that petitioners' seeking of *relitigation*, constraint and diminishment of *Mapp v. Ohio*, 367 U.S. 643 (1961) is not proper before this Honorable Court because of the independent adequate state proscription against illegal searches and seizures found in Article 1, Section 19 of the Constitution of California, and because of the decision of the Supreme Court of California in *People v. Cahan*, 44 C.2d 434 (1955), where the High Court of this state expressed and formalized the suppression sanction in this state not only as an independent State Court interpretation of the Constitution of California, but as an evidentiary rule as well. See also *People v. Bradley*, 1 Cal.3d 80, 84 (1969).

E. Finally, respondents contend that the concepts of "abandoned property" and "agency" are passé and have been abandoned by this Honorable Court in such decisions as *Katz v. United States*, 389 U.S. 347 (1967). As a result, decisions such as *Hester v. United States*, 265 U.S. 57 (1924), and *Abel v. United States*, 362 U.S. 217 (1960), are no longer persuasive, and were not and could not be reasonably relied upon either by police, garbage haulers, respondents, or the California Supreme Court. Only *Katz v. United States, supra*, and applicable Los Angeles County/City ordinances could be realistically relied upon by anyone. The latter were relied upon by respondents in expecting reasonable privacy in their trash can and its contents. See also *Bielicki v. Superior Court*,

57 C.2d 602 and *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968).

The case of *Hester v. United States*, 265 U.S. 57 (1924), relied upon by the petitioner, is *not* inconsistent with the criterion of reasonable expectation of privacy. In *Hester*, fleeing defendants dropped illegally made alcohol virtually in the presence of pursuing officers in "open fields". Clearly, one could hardly expect "privacy" therein, for "what one knowingly exposes to the public", as in *Hester*, hardly bespeaks of reasonable expectations of privacy. *Hester*, therefore, is not necessarily inconsistent with the newer and current concept of "reasonable expectation of privacy". *Katz v. United States*, 389 U.S. 347 (1967).

Abel v. United States, 362 U.S. 217 (1960) presents slightly different circumstances. *Abel* was decided under the "abandonment of property" theory, since supplanted by the "reasonable expectation of privacy" concept. Moreover, it would appear that the items left in the waste basket in *Abel* were not themselves concealed in opaque containers, as in the case sub judice. It would further appear that in *Abel, supra*, no local ordinances were in effect which regulated trash pick-up and precluded unauthorized persons from tampering with trash containers, such as are present in the case at bar, and which provide an independent and adequate state basis for the decision of the Supreme Court of California.

II.

AS TO PETITIONER'S SECOND QUESTION PRESENTED

Respondents contend that any attack in the area of legality of search and seizure should be directed in thrust at either the Fourth Amendment to the United States Constitution itself, or to reversal of the decision of this Honorable Court in *Wolf v. Colorado*, 338 U.S. 25 (1949). It is illogical and unworkable to maintain viability of the Fourth Amendment and *Wolf, supra*, and concomitantly urge a reversal of the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, respondents contend that the independent and adequate state basis of Article 1, Section 19 of the Constitution of the State of California precludes this Honorable Court from assuming jurisdiction, and certiorari was improvidently granted. *Miller v. California*, 392 U.S. 616 (1968).

Respondents suggest that even among petitioners and their *Amicus Curiae*, great confusion and misapprehension occurs. California suggests the average reasonable policeman should be able to decide when to search and seize (Pet. Br. 51). *cf. Coolidge v. New Hampshire*, 403 U.S. 443; *Johnson v. United States*, 333 U.S. 10, 13-14. Yet California feels the law of search and seizure is so esoteric, so replete with nuances, that police officers in the field have difficulty deciding when they may search, partly because of inadequate education of police with respect to legal theory, and partly because of partiality and conflict of interest as regards field law enforcement aims. Furthermore, as pointed out in petitioner's Brief, minimal educational levels as prerequisite for employment of police officers lends weight to this argument.

(Pet. Br. 49-50). The Americans For Effective Law Enforcement in their *Amicus Curiae* Brief (Pages 11 thru 20) suggest, on the other hand, that brilliance of the police in knowing when they can search and seize, being upheld 84% of the time, militates toward a conclusion that the exclusionary rule is no longer needed.

Respondents suggest that the foregoing 180 degree out-of-phase reasoning is sufficient indication for the continued viability of the rule.

Further, respondents contend that this Honorable Court has streamlined search and seizure decisional problems by enunciation of a general principle in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971). This principle forecloses seizure and search of petitioners' trash can without a search warrant or unless conducted contemporaneously with and geographically contiguous to an arrest based on probable cause. *Chimel v. California*, 395 U.S. 752 (1969). *Shipley v. California*, 395 U.S. 818 (1969); *Vale v. Louisiana*, 399 U.S. 30 (1970).

Respondents contend that the decisions of the California Supreme Court in *People v. Edwards*, 71 Cal.2d 1096 (1969) and *People v. Krivda*, 5 Cal.3d 357 (1971) should be affirmed as decisions fully within the sole jurisdiction of the states and foremostly based on sound judicial reasoning and scientific fact. Respondents suggest and contend that the domestic garbage can is sufficiently an adjunct to the home to be accorded the full panoply of search and seizure protection granted to the domocile itself, especially in light of argument above with respect to continued ownership, dominion and control of garbage cans.

"... Columnist Jack Anderson, whose agents assiduously went through Hoover's trash cans recently in an exercise of exceptionally personal journalism, confirmed that he liked to drink Jack Daniels..."

Hoover, said (President) Nixon, (in delivering the funeral eulogy)... "... was one of the giants, a man who helped keep steel in America's backbone, and the flame of freedom in America's soul..."

The Long Reign of J. Edgar Hoover; Time Magazine, Page 19, May 15, 1972.

ARGUMENT

I.

RESPONDENTS WERE, UNDER CALIFORNIA LAW, ENTITLED TO A REASONABLE EXPECTATION OF PRIVACY IN THEIR PRIVATE TRASH CONTAINERS WHILE THOSE TRASH CONTAINERS WERE ADJACENT TO THE HOME. *PEOPLE v. EDWARDS*, 71 C.2d 1096 (1970). MERELY MOVING THEM FROM THE HOME AND ITS ADJACENT CURTILAGE/ ENVIRONS TO THE CURB TO EFFECTUATE PICK UP DID NOT ALTER THE REASONABLE EXPECTATION OF PRIVACY; RESPONDENTS "ABANDONED" THEIR TRASH SOLELY TO TRASH COLLECTORS, WHOSE ACTIVITIES WERE BOUND AND REGULATED BY STATUTE, AND TO NO ONE ELSE.

As noted elsewhere in this brief, even though other state jurisdictions have reached conclusions contrary to the ruling of the California Supreme Court, and even though there is a conflict in the Federal Circuit Courts of Appeals on this subject, the Supreme Court of California remains free to create a higher level of protection for California citizens in rights under the Fourth Amendment, in this case to decide that they have a reasonable expectation of privacy in private residential trash containers and their contents, even though not mandated by the Federal Constitution. *Cooper v. California*, 386 U.S. 58 (1967).

Moreover, as shown elsewhere in this brief, independent and adequate state grounds of non-federal nature support the ruling of California's High Court. The dual independent state grounds are Article I, Section 19 of the California Constitution along with *People v. Cahan*, 44 C.2d 434 (1955), and Los Angeles County/ Municipal ordinances governing garbage disposal and the

interference therewith by unauthorized persons. Because of this independent duality of adequate and independent state grounds, this Court, under a host of its own decisions, is deprived of jurisdiction to adjudicate an alleged concomitant federal error. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Minnesota v. National Tea Co.* 309 U.S. 551 (1940).

Respondents assert herein that manifold logical reasons point to a reasonable expectation of privacy in a private trash can.

Initially, one is faced with a serious question of equal protection of the law for all citizens of a given State or County. Equal protection of the law should not depend on the architectural idiosyncrasies of a residential home, apartment, street, or alley, which, under codes, fixes the location of garbage deposit and collection. Nor, respondents contend, should equal protection of the law depend upon environmental characteristics of a community, such as air pollution, which give rise to statutory proscriptions against burning of trash by individuals, and which thereby make mandatory disposal of trash by methods and procedures adopted for the health of the community and the convenience of the Sanitation Department.

Thus, while some homes provide enclosed porches for garbage cans, clearly part of the home itself, other garbage cans are relegated to an open area adjacent to the rear entry to the home. *People v. Edwards*, 71 C.2d 1096 (1970). Still others are placed permanently a foot or so off the property in a rear alley. Some multiple unit apartment dwellers are provided only with a single large common trash bin, foreclosing individual privacy immediately upon trash deposit but concurrently assuring

anonymity of trash upon initial commingling. While other examples could be cited, it should be apparent that many facilities for the disposal of trash are forced upon the citizen. He can do nothing about the laws which govern disposal of his trash, nor can he do anything about the facilities. In an adjacent rural area, farm residents, on the other hand, may have plenary control over their trash disposal. The perturbations and combinations are significant in number and suggest that severe equal protection problems are in the offing should America's citizens not be afforded protection against either indiscriminate and random, or specifically directed, warrantless searches and seizures in and of their trash barrels and the contents thereof.

Merely echoing that "trash is abandoned property", and "abandoned property has no expectation of privacy" begs the question and misses the philosophical and constitutional issues as viewed from the vantage point of what is reasonable for a citizen to expect as to privacy in residential trash containers.

At the threshold, respondents flatly suggest that if the citizens of this nation be polled completely, few if any citizens would state that they would expect their trash cans to be searched, routinely and randomly, or with specific intent, by law enforcement officers without a search warrant. This appertains from manifold reasons, two of which will be treated:

A. The Knowledge Possessed by Citizens of California Relative to the Facts of Garbage Pick-Up.

Average citizens in Metropolitan areas have seen huge garbage trucks rolling down their streets, workers hurriedly jumping from the yet moving trucks to grab the several containers holding a week's accumulation of refuse. Because of obvious sparseness of time and the significant number of homes visited by them, these workers quickly dump the containers into the cylindrical "wells" from which the trash is hydraulically swept and compressed into the cavernous inner recesses of the trucks.

Both the exigencies of time and a lack of interest in stinking, putrid refuse, containing everything from used Kotex, disposable baby diapers, and overripe fruit, literally covered with maggots, to discarded personal letters, perused, dog-eared old magazines and junk mail, operate to cause these harried and muscled sanitation workers to rapidly propel such vile matter into the gaseous anonymity of the bellies of their huge mechanical scavengers. Few Los Angeles residents have not had the experience of watching neighbors, at the last opportunity to catch the truck, gallantly struggling to pull their garbage cans from the protective environs of the home onto the curb, having forgotten to do so previously. The point is that the even minimally alert and cognizant citizen expects, *knows*, that the usual garbage hauler has neither the time nor interest to conduct a "search". or a "view" of the individual garbage can, and he has a reasonable expectation of privacy in that he therefore expects, *knows*, that refuse there deposited will flow in an uninterrupted manner out to the dump where it will

be burned and/or plowed under by a bulldozer. Counsel can only believe that petitioners are oblivious to the techniques of trash collection in metropolitan areas if they in any way believe it reasonable to expect that police, soliciting the aid of the garbage haulers themselves, will intercept the trash somewhere in the disposal process and grovel and rummage through it like hungry, stray dogs in search of remnants of putrid meat. Reality is to the contrary, and reality governs reasonableness.

Just as surely founded in reality is the fact that the odds militate against a search of a residential Los Angeles garbage can by police or others acting as police agents. The *reality* suggests a lack of reasonable expectation that police or their agents will search a given arbitrary trash can.

Of course, if reasonable and probable cause exists to support search of a given garbage can and/or its residential environs, that is quite another issue, and the constitutionally preferred method is via the search warrant issued and supported by affidavit. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

It must be remembered that the first of the two questions proffered by petitioners is:

> "Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purposes of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pick-up and prior to the commingling of the contraband with the trash of other persons."
> (Petition for Certiorari, page 2; Opening Brief, page 2.)

In examining this certified question in detail, Respondents suggest the following irrefutable axioms of reality:

Few persons, if any, who are legally and bona fidely, by ordinance, able to collect Los Angeles County garbage, would recognize "contraband" if it stared them in the face under pleasant circumstances with ample opportunity to reflect upon it. Fewer yet would care to take the time to contemplate whether something was "contraband", especially when the occasion for such contemplation is shared with assaults on the olfactory senses as are precipitated by the odors of mouldy cheese, cat-sand and its harvest, and decayed food–all assuming an absence of the harried circumstances of attempting to meet a garbage pick-up schedule.

Counsel for respondents, experienced trial lawyers who have defended dozens of illegal narcotics cases, have found that not even professional chemists with university degrees in chemistry "recognize contraband" absent laboratory tests for same. The usual garbage hauler has not had the benefit of a university degree nor its accompanying educational privileges, and *reality* and *reasonableness* suggest a 99.44% unlikelihood of his even suspecting contraband in the course of his occupational activities, carried out under the previously described conditions. There is a similar unlikelihood that he would then "view it" inside of the bin of the truck "some distance from the place of pick-up and prior to the commingling of the contraband with the trash of other persons. . . ."

(Petition for Certiorari, page 2; Opening Brief of Petitioner, page 2).

As indicated, the *reality* of garbage pick-up is attempting to meet a rigid schedule, quickly stopping,

grabbing heavily laden cans, dumping them and quickly elevating the garbage from the "well" or "bin" of the truck into the interior of the truck prior to leaving the situs of pick-up. Thus, *no* distance obtains between situs of pick-up and the place where the act of "commingling of the contraband with the trash of other persons" occurs. To assert that the average garbage hauler has the time or interest or inclination to wallow like a dog in the garbage in the hydraulically operated "well" of the modern sanitation truck insults the intelligence. The "reasonable expectation" of such a hardy soul would be that he would be quickly elevated, hydraulically, by the driver of the truck into the darkened inner recesses of the truck itself, where his scrutiny of the garbage would be the more challenging due to his resulting diminished visual acuity and more pungent odors contacting his olfactory nerves.

Because reality must and does usually govern what is reasonable, respondents suggest that the answer to question 1, proffered by the petitioners, must be a resounding "Yes". The depositor of either contraband or non-contraband in a private garbage can does possess such a reasonable expectation of privacy under the deliniated and certified circumstances presented by petitioners in their question.

Of course, if police or police agents trained in contraband detection solicit the garbage hauler and intercept the garbage, other results may appertain. But the reality, and consequently the reasonableness, of this alternative dictates otherwise. It seems well settled by two major decisions of this Court that it is unreasonable to expect either hotel managers or landlords to lead police on a search of premises rented or leased. *Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United*

States, 365 U.S. 610 (1961). Similarly, it is surely just as unreasonable to believe and expect that garbage haulers will become police agents, and in fact participate with police by allowing police to ransack garbage as it lays in the "well" or "bin" of the truck. It is clear that the examination must be conducted in the "well", or the "bin", before the refuse is elevated inside the truck. Once inside, the matter is of course commingled. In any event, the petitioners certify in their question for ruling by this Court the factual situation of viewing of the material *while it is in the "well", or "bin"* of the truck, and at no other place.

Clearly, existing law protects *persons*, not places. *Katz v. United States*, 389 U.S. 347 (1967). Under the concept of a reasonable expectation that the garbage will remain untampered with, respondents had an expectation of privacy in the can itself near the home, at the curb, in the well for the few seconds that it be there, and into the inner recesses of the truck after elevation, all based on the reasonable knowledge that there is no reasonable opportunity for interference with the process, unless the haulers are coerced or enticed into deviating from their duties as set out in the ordinances in Los Angeles, City and County.

While, in general, "abandoned" property may not be protected, Los Angeles garbage is protected by statute and county/municipal ordinances, Article I, Section 19 of the State Constitution, and *People v. Edwards*, 71 Cal.2d 1096 (1970), a State Supreme Court decision never successfully challenged in or reversed by this Honorable Court.

The United States Court of Appeals for the 9th Circuit in *Corngold v. United States*, 367 F.2d 1 (1967) has recognized that one may "give up" personal matter to another for a particular purpose, and the mere depositing

of that matter with the other person, or system, does not signify an abandonment for an allowance to search the material entrusted. (No right to search appellant's package left at TWA terminal for shipping.) In *Corngold, supra,* appellant did not "abandon" his package, and merely surrendering it for a specific purpose did not suggest "abandonment".

When one deposits mail in a United States mail box, his reasonable expectation is that it will be picked up by postal employees and delivered; he does not expect it to be searched and read by government agents. Likewise, a party shipping something via common carrier has given up possession of it and may never expect to see it again. He has done so, however, for a specific reason. In the case at bar, respondents gave up possession of their garbage for a specific reason to a specific person to accomplish a specific purpose and none of the foregoing included acquiescence or expectation of a police search.

Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) held that the placement of marijuana in a trash can located a few feet within the back door of defendant's home was not an abandonment unless as to persons, such as trashmen, authorized to remove the contents of the receptacle. The foregoing rationale is apropos of respondents' contentions; the garbage is "abandoned" only to the trash collector.

Petitioner essentially acknowledges that a trash can located proximate to the home may be protected as "within the curtilage" (pages 17-21 Opening Brief). The *entire* California Supreme Court so recognizes in *Krivda,* 5 Cal.3d 357 (see dissent). What seems to create the illogical reasoning on the part of the three-man dissent is the forced requirement to carry the can to the curb to effectuate collection; this act is said to create the

"abandonment". Such reasoning is an intellectual non-sequitur.

While the trash in the case *sub judice* was examined "some distance" from the home, it was only done so at the instigation of the police in directing the haulers of the garbage to drive away from the situs of pick-up. Also, the fact that the examination was accomplished in the "well" or "bin" was only the result of the police ordering the collectors to deviate from their required procedures by refraining from elevating the trash into the truck. Were it not for the two foregoing commands, the trash would have been lost for examination purposes immediately at the pick-up situs.

On the merits of the factual circumstances, respondents possessed a reasonable expectation of privacy in their private trash containers.

B. The Mathematical Probability of Any Arbitrary Garbage Can Containing Contraband

Respondents here note that either one of two possibilities are in existence:

1. The police have information which brings them to a specific garbage can location. If they have sufficient *valid* information to support probable cause to obtain a search warrant, they should then proceed to obtain the search warrant and, having done so, may then search a garbage can, either with specificity or perhaps as an adjunct to the general right to search the home, garage, outbuildings, etc. The obtaining of the search warrant is of course the preferred way to proceed and any other search is inherently unconstitutional, subject, of course, to *Post Facto* justification by the police according to well established law. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

2. The police have *no* information at all that a given garbage can contains contraband; they search it at random in an effort to "combat crime" or conduct routine "raids", at random, hoping to find contraband.

Respondents' thesis is simply that 1. above *always* demands a search warrant while 2. above is mathematically unworkable from the standpoint of the science of mathematical probability and statistics. It is, therefore, inherently unreasonable to believe that it would occur. Because of its probabilistic unlikelihood of occurrence, respondents would have a reasonable expectation of privacy in their domestic garbage can.

In 1. above, elementary constitutional law is set forth in a host of decisions of this Honorable Court and the Supreme Court of California. When a search warrant can be obtained, that process is required. Under *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971), it is one of the two mandatory means now available to effect a seizure.

In 2. above, basic mathematical probability is utilized. It may be illustrated by a simple example: The probability of rolling any given number on a die is 1 in 6; the probability of rolling that given number on two consecutive rolls is (1/6) (1/6) = (1/36), i.e., the *product* of the individual probabilities. It is important to recognize that the events studied must themselves be *mutually independent*, and if they are not, the "product rule" of individual probabilities is erroneous. Using the above method of analysis, it can be demonstrated mathematically that the probability of any given garbage can being located and searched "successfully" is so minuscule as to suggest that any given citizen does indeed have a reasonable expectation of privacy in his garbage can. (See Note 1, page 1a, Appendix.)

The Supreme Court of California has rejected the notion that probabilities can be used to establish guilt beyond a reasonable doubt–absent sound bases for the use of statistics. *People v. Collins*, 68 Cal.2d 319, 68 A.C. 329. There is, however, no reason to reject them when they are proffered in the realm of reasonable expectation of privacy. They are, assuming *reasonable* data, mathematically irrefutable.

Respondents suggest that not only the non-mathematical expectation of the citizens of this nation that they have garbage can privacy, but the mathematical one as well, fully portends a reasonable expectation of privacy in the domestic garbage can.

See also, Tribe, "Trial By Mathematics: Precision and Ritual in the Legal Process", 84 Harvard Law Review 1329 (1971); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2028, fn. 2.

More significantly, under the question before the Court, confining the issue of the reasonable expectation of privacy to the condition:

> "... that such contraband will not be viewed *inside the bin* of a garbage truck at some distance from the place of pickup and *prior to conglomeration* of the contraband with other trash ...",

respondents suggest that this additional limitation adds additional, mutually independent factors. (See Note 2, page 4a, Appendix.)

Scientifically, the citizens of America have much more than a reasonable expectation of privacy; the expectation of privacy is established beyond a shadow of a doubt.

The decision of the Supreme Court of California in *People v. Krivda*, 5 Cal.3d 357 (1971) should be affirmed.

II

UNDER THE LAW OF THE STATE OF CALIFORNIA, AS ENUNCIATED BY THE SUPREME COURT OF CALIFORNIA IN SUCH CASES AS *IRWIN V. SUPERIOR COURT* (1969) 1 CAL.3D 423, "ABANDONMENT" HAS A SPECIAL DEFINITION–WHAT CONSTITUTES "ABANDONMENT" IN CALIFORNIA IS NOT A CONSTITUTIONAL ISSUE WHICH MAY BE REVIEWED BY THIS HONORABLE COURT, IT BEING IN THE REALM OF LOCAL PROPERTY LAW, CLEARLY NOT OF FEDERAL DIMENSION. THE DECISION OF THE CALIFORNIA SUPREME COURT THUS IS, ONCE AGAIN, SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

Petitioner California suggests that "Property Law concepts, however, are not wholly irrelevant to an analysis of the scope of constitutional protection afforded by the Fourth Amendment . . . " (Pet. Op. Br., page 14).

While quoting from Law Review articles, lower Federal Courts, and the law of New York (Pet. Op. Br., pages 14-20), petitioner totally fails to acknowledge the definition of "abandonment" under California Law; petitioner fails to acknowledge that "property" concepts are, in general, of non-constitutional dimension, and, therefore, what the California Supreme Court says concerning property and abandonment is the sole concern.

Respondents severely take issue with petitioner's contention that they "abandoned" their garbage.

Under California law, as enunciated once again by the California Supreme Court (*Irwin v. Superior Court*, 1 Cal.3d 423, 429, 82 Cal. Rptr. 484, 462 P.2d 12), "The Rule has always been, as repeated in *Martin v. Cassidy* (1957) 149 Cal. App.2d 106, 110 that:

Abandonment is defined as the voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it *and is entirely indifferent as to what may become of it or as to who may thereafter possess it.*" (Emphasis added)

It is the italicized portion of the foregoing definition which respondents assert to be of governing significance. Clearly, respondents were not indifferent as to the fate of their garbage, expecting that law enforcement would *not* tamper with it; clearly, as well, respondents were not indifferent as to who thereafter might possess it, reasonably expecting that only garbage haulers would exercise temporary possession of the garbage enroute to its ignominious end in the city dump. At no time was police intervention contemplated.

It should be noted here that in the general sense, the expectation of privacy in trash must be considered from the standpoint of what the general citizenry expects. The court could take judicial notice of the fact that the average citizen is not, indeed, indifferent to what may become of the highly personal and revealing tracings of his life's activities.

Hence, again, under California State law, an independent and adequate state criterion for "abandonment" bespeaks of a reasonable expectation of privacy in respondent garbage. The Supreme Court of California's decision in *People v. Krivda*, 5 Cal.3d 357 should be affirmed.

III

UNDER CALIFONRIA CASE LAW THERE IS A PROHIBITION TO A SEARCH INTO CLOSED, OPAQUE CONTAINERS WITHOUT A SEARCH WARRANT; THIS PRECLUDES A SEARCH INTO BROWN PAPER BAGS IN RESPONDENTS' TRASH BARREL, ITSELF A CLOSED OPAQUE CONTAINER. WITHIN THE MEANING OF *COOPER V. CALIFORNIA*, 386 U.S. 58, 62; 87 S.CT. 788, 791 (1967), THE STATES MAY PROVIDE MORE EXTENSIVE SEARCH AND SEIZURE PROTECTION THAN MANDATED BY THE FEDERAL CONSTITUTION; THE SUPREME COURT OF CALIFORNIA HAS THUS PROVIDED AND THEIR EXTENSION IS NOT SUBJECT TO BEING SET ASIDE BY THIS HONORABLE COURT.

As respondents have noted in many other places in this Brief, this Honorable Court has clearly held that the Fourth and Fourteenth Amendments impose *minimum* criteria on the states in the area of search and seizures.

The states, acting via their respective Supreme Courts, or via their own Constitutions, can provide more extensive protection for their citizens. *Cooper v. California*, 386 U.S. 58, 62; 87 S.Ct. 788, 791 (1967).

It is well established under a host of decisions of the California Supreme Court that a search into an opaque closed container may be carried out only with a search warrant. *People v. Marshall*, 69 Cal.2d 51, 59; *People v. McGrew*, 1 Cal.3d 404, 409-410, wherein the Court said:

> "It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant . . . ."

Respondents clearly evidenced their expectation and desire of privacy in their garbage can by placing a lid on the closed, opaque container. Within the can, respondents placed their trash in brown opaque paper bags, closed at the top. Only by entry initially into the can and, secondly, into the bags themselves, could any material placed in the can be examined. This was done initially by garbage haulers acting as police agents in violation of the meaning of *Chapman v. United States*, 365 U.S. 610 (1961) and *Stoner v. California*, 376 U.S. 483 (1964), and, secondly, by police themselves examining the contents of the bags in the "well" or "bin" of the truck. Each act violates California Supreme Court authority, and the prohibition against tampering with the trash cans established by Los Angeles County/Municipal ordinances, so cited.

The latter prohibitions against search into closed opaque trash cans and the tampering therewith are valid, adequate and independent state bases to support the ruling of the California Supreme Court. *Cooper v. California*, 386 U.S. 58; *Minnesota v. National Tea*, 309 U.S. 551; *Johnson v. New Jersey*, 384 U.S. 719.

It must be emphasized that the foregoing California law is not confined to objects of opaque nature in the home. The California Supreme Court has applied it to airline shipments, for example, when they were deposited for shipment at the airport. *People v. McGrew*, 1 Cal.3d 404 (1969); *Abt v. Superior Court*, 1 Cal.3d 418 (1969); *Irwin v. Superior Court*, 1 Cal.3d 423 (1969); see also *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

Under California law, as enunciated by the California Supreme Court, *Abt. v. Superior Court*, 1 Cal.3d 418, 421 (1969), reaffirming its power to provide more adequate protection under the Fourth and Fourteenth

Amendments, and under Article I, Section 19 of the California Constitution:

> "... The probability that a carton of brick-shaped tinfoil wrapped packages will contain marijuana is not sufficient to justify a search without a warrant...."

The foregoing authority stands as a general principle in California Search and Seizure Law, not only under Article I, Section 19 of the California Constitution, but further, as a rule of statewide evidentiary procedure. *People v. Cahan*, 44 Cal.2d 434 (1955). It is applicable under California State law to closed opaque garbage cans. *People v. Robert and Jennifer Edwards*, 71 Cal.2d 1096 (1970); *People v. Judith Krivda and Rodger T. Minor*, 5 Cal.3d 357 (1971).

The ruling of the California Supreme Court should be affirmed. The ruling rests on an independent and adequate state ground.

IV

COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971), PRECLUDES THE SEARCH OF A GARBAGE CAN WITHOUT A SEARCH WARRANT; UNLESS SUCH SEARCH IS MADE CONTEMPORANEOUSLY WITH AND GEOGRAPHICALLY CONTIGUOUS TO AN ARREST, BASED UPON PROBABLE CAUSE, SUCH SEARCH IS CONSTRAINED BY _CHIMEL V. CALIFORNIA_, 395 U.S. 752 (1969).

Respondents contend that this Honorable Court enunciated a principle that is to govern searches and seizures in the United States when it handed down its ruling in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Among the Court's purposes was a desire to simplify the often esoteric and murky world of search and seizure.

Respondents note that the Court particularly emphasized that the rule was simple enough to be understood by both the judiciary and police. That principle simply requires that the police refrain from searching any private property unless either a search warrant is first obtained or unless the search is conducted incident to an arrest based on probable cause. The latter situation, of course, is limited in scope by *Chimel v. California*, 395 U.S. 752 (1969) to a pat-down search of the person and to a search of area immediately within reach of the arrestee, from whence either evidence may be destroyed or a weapon obtained.

Obviously, neither condition of *Coolidge* was met in the case at bar, nor was the arrest made until much later and within the private home of respondents. It is elementary that an arrest can not be made within a private home and used to support a search of an area outside the home. *Coolidge v. New Hampshire, supra.* Nor can an arrest be made outside a private home and used to support a search made within the home. *Shipley v. California*, 395 U.S. 818; *Vale v. Louisiana*, 399 U.S. 30 (1970).

There was no probable cause to believe the can contained contraband, and thus the search can not be justified upon the rationale, often advanced, that permits an automobile search under the "mobility" theory, where probable cause exists to believe that the car might contain contraband. *Carroll v. United States*, 267 U.S. 132 (1925); *Preston v. United States*, 376 U.S. 364 (1964); *Cooper v. California*, 386 U.S. 58 (1967); *Dyke v. Taylor Implement Mfg. Company*, 391 U.S. 216 (1968); *Chambers v. Moroney*, 399 U.S. 42 (1970); *People v. Raymond Ross Laursen*, 22 Cal. App.3d 1033 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

This Court stated in *Coolidge, supra:*

> " . . . we are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily understood and applied by Courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police and a principle that preserves and protects the guarantees of the Fourth Amendment." (91 S.Ct. 2022, 2047).

This principle, taken alone, precludes the search and seizure of respondents' garbage can and its contents.

Where respondents have a reasonable expectation that their garbage can and its contents will not be tampered with by unauthorized individuals or in an unauthorized manner, the garbage can may only be entered via the preferred search warrant procedure. *Katz v. United States*, 389 U.S. 347 (1967). This Fourth Amendment principle has been recognized and applied by the Supreme Court of California, *People v. Krivda*, 5 Cal.3d 357 (1971); *People v. Edwards*, 71 C.2d 1096 (1969). If Cifornia desires to accord higher Fourth Amendment protection to its citizens, it may do so even though not mandated by the Federal Constitution. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791. If California supports the instant result on an independent and adequate state basis, this Court can not assume jurisdiction to decide alleged Federal issues. *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 1782 (1966); Los Angeles Municipal/County Ordinances; United States Constitition, Amendments IX and X.

The search and seizure were unconstitutional, and it is difficult to escape from that conclusion.

Further, it must be called to this Honorable Court's attention that the Supreme Court of California has promulgated its own reasonable expectation of privacy rule. *People v. Edwards*, 71 Cal.2d 1096 (1970). In *People v. Bradley*, 1 Cal.3d 80, 84, the California High Court said:

> "... we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and if so, whether that expectation has been violated by unreasonable governmental intrusion ...."

In view of this state promulgation, analogous to *Katz v. United States*, 389 U.S. 347 (1967), in the field of search and seizure, the instant decision of the California Supreme Court rests on an independent and adequate state ground and on an apparent willingness to extend higher protection in Fourth Amendment matters to California citizens than required by the Federal Constitution. Thus, California has given Fourth Amendment protection to the domestic garbage can under its own adaptation and/or creation of a reasonable expectation of privacy test. It is not for this Court to say that its action is constitutionally wrong.

V

NO THEORETICALLY PRODUCTIVE COMPARISON CAN BE MADE BETWEEN *HESTER V. UNITED STATES*, 265 U.S. 57 (1924), *ABEL V. UNITED STATES*, 362 U.S. 217 (1960), AND *PEOPLE V. KRIVDA*, 5 CAL.3D 357 (1971).

In its brief, petitioner argues that this court should rely on the holdings in *Hester v. United States*, 265 U.S. 57 (1924) and *Abel v. United States*, 362 U.S. 217 (1960) to support the rationale behind a finding that one does not have a reasonable expectation of privacy in one's trash.

An examination of those two cases reveals their inapplicability to the circumstances of the within case.

A.

In *Hester*, defendants were in flight from federal officers and were seen by those officers to throw several containers of illegally distilled whiskey into an open field. The "abandonment" terminology was utilized by the court in its opinion for reasons which are not totally clear to respondents.

Nevertheless, it is a dangerous foundation in reasoning to compare a patently suspicious act with a patently innocent one—quite apart from the issue of "abandonment."

The suspects in *Hester* could not, under any reasoning, be deemed to have been disposing of their whiskey in a commonly accepted fashion, mandated by statute. Theirs was the act of desperate men operating under the influences of a desperate situation.

B.

Despite the interesting reasoning utilized by the court in its opinion in *Abel*, it is clear that the fact situation was so entirely different, as in *Hester*, from the question

being considered by this Court as to render a comparison of the two matters fruitless.

Col. Rudolph Abel, master atom spy, was a guest at a Manhattan hotel when he was arrested by the Immigration and Naturalization Service. Abel was naked at the time of his arrest, indicating his obvious intention to remain, at least for the time being, as a guest in the hotel. A search was undertaken by four I.N.S. agents. Abel was directed to dress, to pack his things and to check out of the hotel. An accompanhing F.B.I. agent obtained his bill from the hotel and Abel paid it. He was then handcuffed and removed to I.N.S. headquarters.

Subsequent to his "checking out", his room was searched and the contraband sought to be suppressed was discovered in a waste basket in that room. That search was carried out with the permission of the hotel management. It is interesting to note that "the hotel practice was to consider a room vacated whenever a guest removed his baggage and turned in his key". (362 U.S. 217, 225.) It is clear that Abel was forceably removed from his hotel room and that the supposed "abandonment" of the items in his waste paper basket was at least suspect. It would be difficult to compare such a fact situation as *Abel* to that of the commonplace situation of disposing of one's trash in the ordinary and mandated fashion.

The Abel arrest and, later, search and seizure were carried out by two different police agencies for two ostensibly different reasons.[1] The first agency, the I.N.S.,

[1]Actually, the entire incident was contrived to effect a single purpose–to apprehend the number one Russian atom spy in the U.S.–at a time in American history (1957) when there was a wide-spread fear of Soviet nuclear aggesssion, when there was a jealously guarded disparity of nuclear capability in favor of the U.S., and when the "cold war" was still quite politically and

was used to clear the way for the second, the F.B.I., by forcing Abel to give up possession of the premises.

If the "abandonment" theory is to hold up at all, it clearly must presuppose Abel's lack of dominion and control over his hotel room. Were this not the case, that is, if it were still deemed to be his room, then the California case of *People v. Edwards*, 71 Cal.2d 1096 (1970) would operate to invalidate the search and seizure (assuming the state of the law presently extant in California for theoretical agrument only.)

Another important distinction is that the waste paper basket did not belong to Abel and was not a closed container, whereas, in the instant case, the covered trash can belonged to respondents, by statute, within the understanding of the police, and factually. There was no third party who had the right, apparent or real, to permit a police search in the instant case, whereas, possibly by contract between himself and the Hotel Latham, there was in *Abel*. Where such contractual relationship may have been permissive in *Abel*, statute mandated to the contrary in *Kirvda*, 5 Cal.3d 357 (1971).

It should be clear that had the court not found that Abel had "checked out", presumably voluntarily, a search warrant would have been required to search his room. To say that one operating under the direction and authority of the police was checking out "voluntarily", for the purposes of justifying a subsequent police search of his hotel room, would be akin to, say, "requesting" a suspect to give up his lease or execute a grant deed to his property in order that his residence may, thereafter be

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emotionally "hot". The importance of Col. Abel was subsequently demonstrated when he was swapped by the U.S. for U-2 Pilot Francis Gary Powers, himself a cause celebre in the USSR.

searched on the theory that he had "abandoned" its contents.

VI

THE DECISION OF THE CALIFORNIA SUPREME COURT IN *PEOPLE V. KRIVDA*, 5 CAL.3D 357 (1971) WAS BASED UPON AND SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE GROUND; AS SUCH, THIS HONORABLE COURT IS DEPRIVED OF JURISDICTION TO DECIDE THE FEDERAL QUESTION(S), IF ANY, THAT ARE ALLEGED TO BE IN ISSUE. MOREOVER, THE SUPREME COURT OF CALIFORNIA MAY ESTABLISH MORE STRINGENT FOURTH AMENDMENT REGULATIONS THAN COMPELLED BY THIS HONORABLE COURT AND THE FEDERAL CONSTITUTION.

In Amendments IX and X of the United States Constitution are found authority which governs the issue whether a municipality, county government, or other subdivision of a state may provide and enact legislation which forbids the action of police such as occurred in this case at bar, where the Federal Constitution has failed to provide.

They, therefore, create a separate and distinct state basis for a decision of a State Supreme Court which may, as in the instant case, preclude a search and seizure of the contents of a garbage can.

Amendment IX provides:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the People."

Amendment X provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

Article I, Section 19 of the California State Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

At Appendix A, page 1 of the Petition for Writ of Certiorari in the instant case appears the decision of the California Supreme Court in *People v. Krivda* (1971) 5 Cal.3d 357.

At page 11, the California Supreme Court notes:

> "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ordinance No. 5860, Ch. IX, Sections 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers (*Id.* §1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalks for collection."

In footnote 7, page 11, Appendix, Petition for Certiorari, the High Court of California notes the following:

> "Note also that ordinances governing trash collections may require the householder to place his trash barrels at the curb along the street in front of his house, at least in the absence of other arrangements

with the collectors. (*Id.*, §1706.) Thus, defendants placement of the barrels near the sidewalk was not necessarily indicative of any intent other than to comply with such a requirement. We would be reluctant to distinguish Edwards (*People v. Edwards*, 71 Cal.2d 1096, September 24, 1969, the first "garbage can" decision of the California Supreme Court) solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection."

The City and County of Los Angeles have enacted, under authority of Amendments IX and X of the United States Constitution, elaborate ordinances which govern garbage hauling and which prohibit non-licensed persons, including police, from tampering with these garbage cans in the absence of a search warrant.

The Supreme Court of California has exercised its sovereign federalism power granted, *inter alia*, by *Cooper v. California*, 386 U.S. 58 (1967) to provide more stringent rights under the Fourth Amendment, and has granted to its citizens a right to privacy, under the Fourth Amendment, in the residential garbage can. Moreover, it had done so under the foregoing and following Municipal and County Ordinances, providing an independent and adequate state ground for its decision.

In the section headed "Los Angeles County Ordinances", at page 4 of this Brief, counsel have set forth, verbatim, appropriate sections of Los Angeles City and County Ordinances which govern this case.

In perusing these City and County Ordinances which are applicable to the instant case and upon which, *inter alia*, the California High Court based its ruling, it is to be noted that only *licensed* collectors may gather trash (*supra*, p. 5). No one may obtain a *license* until he has

put up a bond (*supra*, p. 6). Specific *hours* are provided for *collecting* trash (*supra*, p. 6), and for care of the trash cans (*supra*, p. 7). Further, Section 1706 (*supra*, p. 7) provides elaborate details for the requirements of placing the cans at curbside. While arrangements may be made for having the garbage collectors pick up a backyard located can, this likely would be reserved for people disenabled physically. Respondents are young and able bodies, and no need arose to circumvent the placing of the can at curbside, pursuant to statute.

Section 1707 provides *time* boundaries between which the cans must be placed at and removed from curbside. And, lastly and importantly, Section 1710 prohibits the tampering by an unauthorized *person* with the container, and inferentially its contents, for the contents may not of course be removed without tampering with the can itself.

Logically:

(1) *Persons* (Section 1710) *having no authority* may not tamper with the can;

(2) *Persons* (Section 1601) include municipalities acting obviously thru their agents, here *police*, who thereafter illegally recruit garbage haulers to *act in a police capacity;*

(3) *Police* have no license to haul waste and have put up no bond and can not qualify as garbage haulers (Sections 1611, 1612 and 1618);

(4) Police are therefore unauthorized *persons* who can not tamper with Los Angeles garbage cans through the use of garbage hauler agents.

The import of the foregoing is the following:

Respondents KRIVDA and MINOR were residents of Los Angeles at the time of their arrest. As such they were precluded from burning their trash because of the smog

and other air pollution-precipitated restrictions as codified in Los Angeles. Thus, they could not dispose of trash unless they conformed to the requirements of the ordinances and the City/County trash pick-up facilities. To take advantage of these facilities, they were required to comply with the applicable ordinances, which required *inter alia*, bringing the trash to the curbside to facilitate its pick-up. Indeed, if the trash barrels were not brought to the curbside, the trash would not be picked up. In this sense, the rules of search and seizure under the Fourth Amendment are modernly measured by the criteria of "reasonable expectation of privacy" rather than on the passé "property" or "agency" concepts, *Katz v. United States*, (1967) 389 U.S. 347.

Counsel would be remiss if they did not suggest that in reality Los Angeles had instituted a de facto "contract of adhesion" between itself and the homedwelling resident desiring to rid himself of his garbage. The resident dweller must conform to highly regulated procedures, set by code, in order to rid himself of his refuse. He is otherwise unable to part company with it. Concomitantly, the ordinances provide rigid protective regulations governing *who* may pick up the garbage and under what circumstances.

A. The Independent and Adequate State Ground.

The California Supreme Court recognized and gave credence to these City/County ordinances in the decision of this case and these ordinances provide an independent and adequate state ground to support a ruling that Los Angeles police may not make police agents of the garbage hauler, ordering or enticing the garbage hauler to violate the regulations and ordinances in order to allow a search and seizure of the garbage.

Respondents note with careful interest that petitioners contend (Page 33, Opening Brief) that the police "had apparent justification for their *belief* that an examination of respondents' trash in the well of the trash truck was not an unreasonable search."

Petitioner here apparently ascribes knowledge of *Abel v. United States,* 362 U.S. at 241, to the police. Because of this allegation of their intimate knowledge and belief, petitioners argue that the police "knowingly" and "legally" proceeded with the search. Petitioners conveniently forgot to ascribe concomitant knowledge of the foregoing *local ordinances* to the police, which ordinances specifically forbid such activity on the part of the garbage haulers and the police. These ordinances were also presumably known to the garbage haulers who themselves should have refused to violate them for the police.

The foregoing independent and quite adequate state ground precludes this Honorable Court from considering the Federal Allegation of error under the Fourth and Fourteenth Amendments of the Federal Constitution.

As this Court has said in *Johnson v. New Jersey* (1966) 384 U.S. 719, 735, 86 S.Ct. 1772, 1782:

> "The New Jersey Supreme Court invoked a state procedural rule previously applied in another confession case, as a bar to reconsideration of petitioner's coerced confession claim, even in the light of their new allegations regarding the denial of outside assistance. See New Jersey Rev. Rules 3:10, A-5 (1965 Supp.); *State v. Smith,* 43 N.J. 67, 202 A.2d 669 (1964). *This is an adequate state ground which precludes us from testing the coerced confession claim on the present review, whatever may be the significance of the state court's reliance on its*

procedural rule in federal habeas corpus proceedings. See *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822 (1963).

For further authority that precludes consideration by this Court in view of the presence of an independent, adequate state ground, see *Minnesota v. National Tea Co.,* 309 U.S. 551 (1940); *Jankovich v. Indiana Toll Road Commission,* 370 U.S. 487 (1965); *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210; *Lynch v. New York ex. rel. Pierson,* 293 U.S. 52; *New York City v. Central Savings Bank,* 306 U.S. 661. See also, *Honeyman v. Hana,* 300 U.S. 14.

In *Herb v. Pitcairn, supra,* at 125-26, this Court held:

> "Our only power over state judgment is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Obviously, even though this Court could rule that there was no illegal search and seizure pursuant to the Fourth Amendment, the California Supreme Court could rely on either the concomitant Article I, Section 19 of the State Constitution, *supra, or,* as it did in deciding *People v. Krivda,* (1971) 5 Cal.3d 357, that local county and municipal ordinances provide an independent and adequate state ground. In this sense, any decision of this Honorable Court, even assuming valid jurisdiction arguendo, would be merely an advisory opinion on the Federal issue of the Fourth Amendment. As such, jurisdiction does not lie in this Honorable Court, and

Certiorari was improvidently granted. *Miller v. California*, 392 U.S. 616, 88 S.Ct. 2258 (1968).

On the other hand, if an independent and adequate state ground deprives the criminal *defendant* of rights guaranteed by the Fourth and Fourteenth Amendments, this Court can give, and has given, relief. *Henry v. Mississippi*, 379 U.S. 443 (1965). In *Henry*, this Court again clearly spoke, however, on the issue of the valid independent state ground and adequate state basis, *even though* a federal question is simultaneously decided. At 379 U.S. 443, 446, 85 S.Ct. 564, 567, the Honorable William J. Brennan stated:

> "It is of course a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even though these judgments also decide federal questions. . . ."

Respondents thus contend that the ruling of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357, 366 that:

> ". . . The provisions of these *ordinances* would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection. . . ."

constitutes an independent and adequate state ground to support the decision of the California Supreme Court.

In passing it is significant to note that the three man dissent in *Krivda* stated, *inter alia*, at 5 Cal.3d 357, 368:

> "I do not question the proposition enunciated in *People v. Edwards, supra*, 71 Cal.2d 1096, that trash cans immediately adjacent to a home, in a place to which the general public is not invited, are within a "constitutionally protected area" (*Hoffa v. United*

States (1966) 385 U.S. 293, 301) as to which the owner may reasonably expect privacy from governmental intrusion. That expectation, however, is inextricably bound up in the physical location of the trash cans. I can not accept the proposition that either *Edwards* or the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor do I find any constitutional compulsion for the newly developed doctrine of "commingled trash." . . ."

Thus, the California Supreme Court was *unanimous* that a trash can immediately adjacent to the home should be protected, but the Court differed as to the effect of the simple fact that respondents can was placed at curbside.

Respondents, however, as covered in this Brief above, were *forced*, by local ordinances, to place their can at curbside, and logically should not be denied equal protection of the laws merely because they had to comply with local City/County ordinances to effectuate pick-up of their trash.

Thus, the distinction set forth in the three man dissent is not intellectually satisfying. It suggests an equal protection of law problem, to wit, discrimination against people in locales where the can *must* be placed at curbside to enable pick-up, as opposed to people in locales where haulers might be willing to enter, say, a garbage storage area or back porch to collect the can's contents.

The independent and adequate state ground, taken by itself, deprives this Honorable Court of jurisdiction and provides a non-federal ground to support the decision of the California Supreme Court.

B. The Permissible and Higher State Standards Under the Fourth and Fourteenth Amendments

Respondents contend that the Supreme Court of the State of California may impose more stringent search and seizure regulations upon State Courts and State law enforcement, thus providing higher protection for its citizens than required by this Honorable Court and by the Federal Constitution. It has done so in the case at bar.

Indeed, this Honorable Court has specifically enunciated that the *States and Supreme Courts of the States may in general provide stricter constitutional standards than those laid down by this Court.* Concerning the retroactivity of *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and *Escobedo v. Illinois*, (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, this Honorable Court per Chief Justice Warren stated in *Johnson v. New Jersey*, (1966) 384 U.S. 719, 733, 86 S.Ct. 1772, 1781:

> "In the light of these additional considerations, we conclude that *Escobedo* and *Miranda* should apply only to cases commenced after those decisions were announced. We recognize that certain state courts have perceived the implications of *Escobedo* and have therefore anticipated our holding in *Miranda.* Of course, *states are still entirely free to effectuate under their own law stricter standards that those we have laid down and to apply those standards in a broader range of cases than is required by this decision.*"

Similarly, in *Jenkins v. Delaware*, (1969) 395 U.S. 213, 222, 89 S.Ct. 1677, 1682, fn. 10, this Court provided, concerning applicability of *Miranda* to *retrials*:

> "... A state is free, of course, for any reason it finds persuasive, to apply *Miranda* to a *subsequent*

trial of a defendant whose original trial commenced prior to that decision. . . ."

And, for a more applicable issue, to search and seizure itself, this Court provided in *Cooper v. California,* (1967) 386 U.S. 58, 62, 17 L.Ed.2d 730, 734, 87 S.Ct. 788, 791:

> "Our holding, of course, does not affect the State's *power to impose higher standards on searches and seizures* than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own harmless-error rule to such errors of state law. . . ."

As examples, other than *Krivda*, of more stringent Fourth Amendment standards adopted by California, see also *Kaplan v. Superior Court,* (1971) 6 Cal.3d 150, 155, and *People v. Martin,* (1955) 45 Cal.2d 755. In *Kaplan* and *Martin,* the California Supreme Court held and adopted for California the rule that a criminal defendant is entitled to object to the introduction of evidence illegally seized from a third person, even though the "vicarious exclusionary rule" is not required as a matter of federal constitutional law under the prevailing federal interpretation of the Fourth Amendment. *Alderman v. United States,* (1969) 394 U.S. 165, 171-176, 22 L.Ed.2d 176, 185-188, 89 S.Ct. 961.

Moreover, as is seen by the initiative of states willing to apply the exclusionary rule long before this Court so mandated in *Mapp v. Ohio* 367 U.S. 643 (1961), the states are free to specifically provide that "illegally seized evidence is inadmissible against anyone for any purpose." *Alderman v. United States,* (1969) 394 U.S. 165, 175, 22 L.Ed.2d 176, 188, 89 S.Ct. 961.

Summarizing:

(1) Respondents thus assert that the various municipalities within, and Los Angeles County itself, have "preempted the field" by enacting local ordinances, as they may do under the Ninth and Tenth Amendments, in an area in which the Federal and State Constitutions and Federal and State Statutes have not spoken. Compare *Halpin v. Superior Court,* (1972) 6 Cal.3d 885.

(2) Respondents assert that the California Supreme Court gave credence to these independent and adequate statutes in striking down the search and seizure of California garbage cans as illegal and thus based their decision on an independent *and* adequate state ground. *People v. Krivda,* (1971) 5 Cal.3d 357, 366; see also, Article I, Section 19, California Constitution and *People v. Cahan,* (1955) 44 Cal.2d 434.

(3) Respondents assert that the California Supreme Court is free to provide more stringent search and seizure regulations as set forth in any Federal Statute or the Federal Constitution, within the meaning of *Johnson v. New Jersey, supra; Jenkins v. Delaware, supra; Cooper v. California, supra;* and *People v. Martin;* and *Kaplan v. Superior Court, supra.* This the California Supreme Court has done in its dual decisions regulating the search and seizure from garbage cans. *People v. Edwards,* (1970) 71 Cal.2d 1096; *People v. Krivda and Minor,* (1971) 5 Cal.3d 357.

Moreover, these dual decisions are independent of what any other State Supreme Court may do in reliance on its own interpretation of such constitutional search and seizure provisions as may pertain in its own state to the right of privacy in garbage cans. There may be, in those states, (a) no local municipal and county ordi-

nances in effect, or (b) Supreme Courts which may simply have chosen not to apply more stringent search and seizure regulations within their jurisdictions. *State v. Purvis*, (1968) 249 Ore. 404, 438 P.2d 1002; *Croker v. State*, 447 P.2d 122 (Wyoming, 1970).

Similarly, the California Supreme Court's feelings regarding garbage can searches are not to be regulated by what *lower* Federal Courts may feel, within their respective jurisdictions, on the issue of search and seizure of garbage cans; recognizing, of course, that the Supreme Court of California is bound by decisions of *this* Honorable Court *where jurisdiction* is proper. The Supreme Court of California has recognized this principal.[1]

Thus, reliance by petitioners on decisions of the Federal Circuit Courts of Appeals regarding garbage can searches is not commanding to the High Court of California should it wish to exact more stringent search and seizure requirements. *Cooper v. California*, 386 U.S. 58, 62. See *United States v. Dzialak*, 441 F.2d 212 (2nd Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Minker*, 312 F.2d 632 (3rd Cir. 1962); *contra*, *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957).

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[1] In *People v. Bradley* (1969) 1 Cal. 3d 80, 86, where reasonable expectation of privacy in marijuana plants in a backyard of a private home was in issue, the California Supreme Court stated:

> ". . . Furthermore, although we are bound by decisions of the United States Supreme Court interpreting the Federal Constitution (citing cases), we are not bound by the decisions of the lower Federal Courts, even on federal questions. . . ."

(4) Finally, in view of the local municipal and county ordinances regulating the collecting of garbage, respondents KRIVDA and MINOR had reasonable expectations that (a) they would be free of unreasonable governmental interference and intrusion into their garbage, (b) garbage haulers were in fact bona fide garbage haulers, not agents of the police department, (c) material deposited in their private garbage can would be dumped into a garbage truck containing a large conglomeration of garbage, indistinguishable from any other garbage, and (d) carried to a local dump where it would be burned or plowed under by bulldozer, all within the meaning and spirit of *Stoner v. California,* 376 U.S. 483 (1964), and *Chapman v. United States,* 365 U.S. 610 (1961).

Respondents had a reasonable expectation that garbage haulers would not lead police on a "tour of their garbage".

The *existing law* in Los Angeles County not only, in the minds of respondents, created a reasonable belief that only licensed garbage haulers would be contacting and handling the refuse, but that *some* existing *law forbade* police from soliciting the tampering of the trash can and its contents by enticing the garbage haulers to assume the role of police agents, the police themselves being unauthorized and unlicensed to in any way deal with matters of garbage.

VII

WHETHER THE EXCLUSIONARY RULE SHOULD OR SHOULD NOT BE APPLIED UNDER THE CIRCUMSTANCES OF THE PRESENT CASE IS NOT THE ISSUE; THE CALIFORNIA SUPREME COURT DECISION IN *PEOPLE V. CAHAN*, 44 CAL.2d 434 (1955), APPLYING THE EXCLUSIONARY RULE IN CALIFORNIA, IS A RULE OF EVIDENCE PROMULGATED BY THAT COURT FOR APPLICATION IN THE STATE COURTS OF CALIFORNIA, AND, AS SUCH, IS AN INDEPENDENT AND ADEQUATE STATE GROUND, WITHIN THE MEANING OF *COOPER V. CALIFORNIA*, 386 U.S. 58 (1967), WHICH SUPPORTS THE RULING IN THIS CASE AND WHICH DEPRIVES THIS HONORABLE COURT OF JURISDICTION. THE CHALLENGE, IF ANY, ON A FEDERAL LEVEL, SHOULD BE TO THE VIABILITY OF THE FOURTH AMENDMENT ITSELF AND TO *WOLF V. COLORADO*, 338 U.S. 25 (1949).

Respondents could not hope to reiterate or review in this brief all of the pro and con arguments, articles, cases and treatises that have discussed the exclusionary rule as applied to violations of the Fourth Amendment.

It is well, however, to recall that the adoption of the exclusionary rule was by choice of the states themselves, initially, until *Mapp v. Ohio*, 367 U.S. 643 (1961), and presumably the status quo ante would obtain should any serious encroachment upon the *Mapp* decision be decreed by this Honorable Court.

It is well established in history that special interest groups periodically renew judicial efforts to alter existing laws in order to advance their own aims. These efforts have coincided with significant changes in membership of this Honorable Court. Even the late President Franklin Delano Roosevelt was sufficiently moved to attempt to

alter the Court itself in an effort to secure more sympathetic response to the legislation of the New Deal in 1937 in his abortive and ill-timed "court packing" maneuver. The addition of four new members to this Honorable Court by President Nixon apparently portends a propitious opportunity in the eyes of petitioner to "do away" with the exclusionary rule.

Respondents suggest, however, that the petitioner is in attack on the wrong element; its attack is on the branches instead of the tree itself.

Respondents suggest that the only logical national attack must be in thrust at the continuing viability of the Fourth Amendment itself via Constitutional Amendment, if at all, or to reconsideration of *Wolf v. Colorado*, 338 U.S. 25 (1949). This of course has been accomplished in the past as may readily be seen in consideration of Amendments XVIII and XXI, establishing and repealing National Prohibition.

An attack at the lower level—the level of the exclusionary rule itself—truly misses the fundamental problem.

Petitioner would do well to review the entire language of the opinion of the Honorable Roger J. Traynor, Chief Justice of the Supreme Court of California, who remains in memory as one of California's most revered and scholarly jurists, which he wrote in *People v. Cahan*, 44 Cal.2d 434 (1955), and which, in pertinent parts, is set forth in *haec verba*, in the appendix, at page 1b.

A. The Decision of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357 (1971) can be supported on at least two independent and adequate state Grounds.

1. Article I, Section 19 of the Constitution of California and the decision of California's Supreme Court in *People v. Cahan*, 44 Cal.2d 434 (1955).

In *Cahan, supra,* Justice Traynor first sets forth some of the oft-quoted reasons for non-application and elimination of the exclusionary rule. Paraphrasing:

a. A criminal trial is a search for truth, and the exclusionary rule deprives the trier of fact of perhaps the most probative evidence available. The evidence secured illegally is just as reliable as that lawfully obtained (44 C.2d at 442-443).

b. The suppression of the evidence neither protects the defendant from the illegal search and seizure, for that has already occurred, nor does it chastise the errant police (44 C.2d at 443).

c. Civil cases allow the use of illegally-seized evidence (44 C.2d at 443).

d. There is no convincing evidence that the exclusionary rule actually tends to prevent unreasonable searches and seizures (44 C.2d at 444).

After careful analysis, however, Justice Traynor, writing for the 4-3 majority, concluded that:

> "... evidence obtained in violation of the constitutional guarantees is inadmissible ... because other remedies have completely failed to secure compliance with the constitutional provisions of the part of police officers with the attendant result that the Courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. ..." (44 C.2d at 445)

Significantly, Justice Traynor went on to state:

> "... If the unconstitutional guarantees against unreasonable searches and seizures are to have significance, they must be enforced, and if courts are to discharge their duty to support the state and

federal Constitutions, they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by *other* means than excluding evidence obtained by their violation, different problems would be presented.... Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures ..." (44 C.2d 447)

2. Local Los Angeles County/Municipal Ordinances which couple with the Ninth, Tenth and Fourteenth Amendments to the United States Constitution to provide a prohibition of unauthorized tampering with garbage cans.

B. An attack on the exclusionary rule goes to the retention of the Fourth Amendment and the Rationale of *Wolf v. Colorado*, 338 U.S. 25 (1949).

The late Justice Murphy of this Honorable Court, dissenting in *Wolf v. Colorado*, warned that:

> "Alternatives (to the exclusionary rule) are deceptive. Their statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all...." (*Wolf v. Colorado*, 338 U.S. 25, 41 (1949).

The Honorable Chief Justice Warren Burger of this Honorable Court, in dissent in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 420 (1971), recognized the unfeasibility of abandonment of the suppression doctrine until some meaningful alternative can be developed.

Respondents suggest that past experience and thoughtful contemplation of the possible alternatives lead to the conclusion that the exclusionary rule is based on sound and mandatory grounds.

Some may suggest that the aggrieved defendant may pursue a Civil Rights suit under 42 U.S.C. 1983, but such an action has severe pragmatic problems. Among them are the inherent difficulties in pursuing such litigation from a prison, if the aggrieved victim is placed in custody for a significant period, and the dubious substitution and equation of monetary damages with a conviction that might not have occurred had the defendant been accorded his Fourth Amendment rights *ab initio*. Surely, it would be a rare jury who would award substantial damages to a civil rights plaintiff who had been shown, when a criminal defendant himself, to be a law breaker, successfully prosecuted by the very evidence illegally taken from him.

In the case where an illegally planned seizure turns up *no* incriminating evidence, would police officers likely inform him of the civil rights violation they have perpetrated so the aggrieved may be compensated? The question itself is almost ridiculous and the answer self-suggestive.

It must be recognized that illegal searches and seizures do not carry the emotional appeal to their error that violations of Freedom of Speech, Press and Religion command; they lack the obvious brutality of coerced confessions and "third degrees", and do not strike such a convincing blow at the very basis of our civil liberties. As such, their violations tend to go unnoticed and ignored.

Respondents suggest that pragmatically the alternatives are unworkable. The rule must be kept intact. The alterations, if any, must come via repeal of the Fourth Amendment, or reevaluation of *Wolf v. Colorado*, 338 U.S. 25 (1947).

Over thirty years ago, New York Senator Robert F. Wagner spoke with sagacity on the real issue of whether

the Fourth Amendment itself should be repealed instead of directing attack toward the much cussed and discussed exclusionary rule:

> "Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is the only sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
>
> "It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of the search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge . . . , the burden is on those who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to the inclusion in this amendment of the one sanction which will give the constitutional provision, however it is defined, genuine meaning." (Senator Robert F. Wagner speaking before the New York Constitutional Convention of 1938. Record of the New York State Constitutional Convention 559-560, reprinted in Allen, "The Wolf Case", 45 Ill. L. Review, 1, 19 as cited in 44 C.2d at 450.)

The changes, if any, must come at the Constitutional Amendment level.

It is interesting to note that even among the Briefs filed by California and *Amicus Curiae* in this case, there is confusion as to the reasons for abandonment of the rule. California suggests that knowledge possessed by officers at the time of seizure of the garbage led them to believe that they were within the law "to seize abandoned property" under *Abel v. United States*, 362 U.S. at 241 (Page 33, Opening Brief, California). Actually, the existing local law in Los Angeles County *forbade* such garbage can tampering, thus clearly indicating that the police were incapable of determining what the "law" was, or sere simply wrong, and bespeaking the desirability of imposing a disinterested magistrate between the people and the police. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); they clearly did not "know" that the "law" was.

The Brief of the Americans For Effective Law Enforcement, Inc., filed Amicus Curiae, suggests that the police are becoming so educated and are behaving so well that the exclusionary rule is no longer necessary (Pages 11-19, inclusive). In order to create emotional appeal, they suggest the police were "correct" in 84% of litigated search and seizure cases, and in cases where they were "wrong", the rule itself was unsound because particularly despicable defendants thereby escaped the full thrust of the law. The recent and exhaustive decision of this Honorable Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), is particularly offensive to this group (Page A1, A2, Appendix), but as Justice Potter Stewart has more calmly and neutrally observed:

> "We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the

commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law." (91 S.Ct. 2022, 2027).

It is this more serene and deliberate judicial evaluation which petitioners seek to do away with, and which this Honorable Court must again preserve. On the one hand, police spokesmen contend they are quite capable of personally deciding when to search and seize, and on the other hand the facts belie this contention and strongly suggest the need for the continuing vitality of the interposed magistrate. California fails to even admit the presence of the local ordinances in its Opening Brief; it does suggest the "uncertainty confronting the police" is manifested by the split decision of the California Supreme Court in 5 Cal.3d 357 (Pages 33-34, Brief, California). Respondents echo this "uncertainty" and suggest that this alone bespeaks for the continuation of the judicial scrutiny and exclusionary rule for violations. It seems clear that what is not totally lucid to well-trained judges can not be that evident to the biased police in the field making decisions whether to search or not, and this fact alone cries out for maintenance of the rule.

The State of Illinois, filing a brief Amicus Curiae, in urging rejection of the exclusionary rule, admits that many of its police lie on the witness stand in order to successfully convince the magistrate that their search and seizure tactics were not in violation of the Fourth Amendment (Page 6, Brief, Illinois, *Amicus Curiae*). While a more fundamental suggestion might be for Illinois police to stop lying and recognize the law as determined by a neutral magistrate rather than themselves, it is again suggested that the only meaningful changes must come via the constitutional amendment route.

Petitioners seem to suggest the desirability of a return to the status created by the period following this Honorable Court's decision in *Wolf v. Colorado*, 338 U.S. 25 (1949) and before *Mapp v. Ohio*, 367 U.S. 643 (1961). The suggestion would seem to create a situation that may be analogized to what would prevail following ruling of this Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) by allowing any state to thereafter nonetheless try defendant for felonies without lawyers; to allow prosecutors to comment on the fact that a defendant did not take the witness stand even after *Griffin v. California*, 380 U.S. 609 (1965), and *Chapman v California*, 386 U.S. 18 (1967) or to allow trial without jury in a state criminal prosecution after *Duncan v. Louisiana*, 391 U.S. 145 (1968). Without the exclusionary rule to back up the mandates of the Fourth Amendment, it is difficult to suggest a rationale for the retention of the Fourth Amendment itself insofar as the states are concerned. Because the bulk of the nation's criminal prosecutions are handled by the state courts, it seems incongrous to have exclusion of illegally seized evidence in the federal court system but permit it in the state court system. Either *Wolf, supra*, or the Fourth Amendment itself should be reevaluated.

Respondents suggest that this Honorable Court in 1914 first gave consideration to the wisdom of excluding evidence obtained by illegal search and seizures. *Weeks v. United States*, 232 U.S. 383 (1914). Some 60 years of steady judicial consideration have elapsed in a move toward the generation of *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Mapp v. Ohio*, 367 U.S. 643 (1961). Last year this Court produced an exhaustive Fourth Amendment analysis in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In the term immediately concluded, a unanimous Court struck down illegal search and seizure via domestic

wire taps. *United States v. United States District Court For the Eastern District of Michigan, Southern Division, et. al.*, ___U.S.___ (1972), 92 S.Ct. 2125. Nothing in that unanimous decision suggests the lack of feasibility of the exclusionary rule.

Respondents suggest that the judicial thinking of such distinguished Courts, favored with Louis Dembitz Brandeis, Benjamin N. Cardozo, Harlan F. Stone, Charles Evans Hughes, Felix Frankfurter and Earl Warren, to name but a half-dozen Justices in that sixty-year period, should not be decreed fallacious in their reasoning and consigned to the pages of history reserved for less august bodies by emotional special interest groups offering non-defined placebos. Today, as in *Wolf v. Colorado*, the alternatives are deceptive. 338 U.S. 25, 41 (1949). The logical attack, if any at all, is to the Fourth Amendment itself. The exclusionary rule must remain.

Inter alia, California suggests that:

> "... An elaborate and intricate system of rules can do little but confuse an already perplexed police officer...." (Brief, California, Page 51).

Petitioners and their *amicus curiae* fail to recognize the great simplification wrought in the area of search and seizure by this Honorable Court's decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), 91 S.Ct. 2022, 2047. Therein this Court promulgated a rule and a principle which seemingly should be understandable to judge and policeman alike:

> "... We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily under-

stood by courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police, and a principle that preserves and protects the guarantees of the Fourth Amendment. . . ."

It would seem, then, that the problems suggested by California (Pages 48 thru 53, Opening Brief), i.e., that police have difficulty deciding *when* they may search and seize, are greatly answered and solved.

It would further seem that the statistics of the Americans for Effective Law Enforcement presented in their brief, at pages 11 thru 19, inclusive, i.e., that the police are correct in 84% of the cases, can now be even higher because of the simplified rule of *Coolidge*.

In short, the police, previously finding uncertainty in their decision to search, now have a brighter guiding beacon; erudite police can increase their statistical average, *and* the citizen is still protected.

California's brief truly "flies in the face" of this Honorable Court's decision in *Coolidge, supra*. California embraces the old New Hampshire rule of letting the police and prosecutors decide what is reasonable.

Petitioner suggests the following absurdities and contra-*Coolidge* rationales:

(1) ". . . Therefore, when it appears to the *police officer* (emphasis supplied) that it is sufficiently probable that the action he intends to take does not violate Fourth Amendment rights, the exclusionary rule should not be applied. . . ." (Pet. Brief, Page 51)

(2) ". . . In applying this basic knowledge to a determination of probable cause, the *police officer* (emphasis supplied) must determine whether there is more evidence for than against, supported by

evidence which inclines the mind to believe but which leaves some room for doubt. . . ." (Pet. Brief, Page 51)

Until reading petitioner's brief, this counsel assumed that only a *judge* determined probable cause, not a policeman.

The late Justice Robert Jackson was quite clear on this point:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant, would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent . . ." *Johnson v. United States,* 333 U.S. 10, 13-14; cited with continuing approval, *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 573, 91 S.Ct. 2022.

As this Honorable Court said in *Byars v. United States,* 273 U.S. 28, 33-34, 47 S.Ct. 248, 250, 71 L.Ed. 520 (127):

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and

seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." Cited with approval in *Corngold v. United States*, 367 F.2d 1 (9th Circuit 1966).

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Respondents suggest that this Court might well, in its decision in this case, promulgate alternatives to the exclusionary rule to be applied concomitantly with and in addition to the exclusionary rule. If these alternate sanctions appear workable, it may *thereafter* be possible to retreat from the exclusionary rule. It would then be possible to ascertain whether petitioner's asserted contentions prove feasible without withdrawing the protection of the rule. Contemporaneously, legislation could be initiated to Amend the Constitution itself if study and scholarship reveals the judiciousness of so

doing. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (dissent of Mr. Chief Justice Burger). Page 40, Brief, California. Oakes, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. (1970) at page 753.

If petitioners feel that other alternatives to the exclusionary rule are workable, let them be tested *along with* the exclusionary rule, not without. Federal funding could create a National Police and Law Enforcement Academy to train police leaders in Search and Seizure. Were this undertaken, accomplished and studied to see if the results showed a move toward a significant resolution of the problem, then, *thereafter* appropriate curtailment of the exclusionary rule might be considered and undertaken.

When "some meaningful alternative" is developed, consideration may be given to abandonment of the exclusionary rule. 403 U.S. 388, 420 (1971).

Further, and in passing, it would appear that any abandonment of the exclusionary rule would be the creation of an ex post facto law with respect to respondents, and thus be not applicable to them.

VIII.

BY WAY OF SPECIFIC OVERT RULING, THE CALIFORNIA SUPREME COURT BASED BOTH OF ITS DECISIONS IN *PEOPLE V. EDWARDS*, 71 Cal. 2d 1096 (1969) AND *PEOPLE V. KRIVDA*, 5 Cal. 3rd 357 (1971), SUPPRESSING EVIDENCE SEIZED IN THE DOMESTIC GARBAGE CAN, ON ARTICLE I, SECTION 19 OF THE CALIFORNIA CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; WHERE THE JUDGMENT OF A STATE COURT RESTS UPON TWO GROUNDS, ONE OF WHICH IS FEDERAL AND THE OTHER NON-FEDERAL IN CHARACTER, THE JURISDICTION OF THIS HONORABLE COURT FAILS IF THE NON-FEDERAL GROUND IS INDEPENDENT OF THE FEDERAL GROUND AND ADEQUATE TO SUPPORT THE JUDGMENT.

While respondents have elsewhere discussed the independent, adequate state basis for the judgment it is here desirable to specifically point out that the dual garbage can decisions of the California Supreme Court are based on the State Constitution in part; that is, it is of salient and significant importance to realize that the California Supreme Court in *People v. Edwards*, 71 Cal. 2d 1096, 1104-1105 (1969) overtly based its decision that the garbage can was illegally seized and searched upon *BOTH* the Fourth Amendment to the United States Constitution *AND* Article I, Section 19 of the California Constitution.

Our High Court said, per the Honorable Louis Burke:

"It is also clear that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. The United States Supreme Court repeatedly has emphasized that the mandate

of the [Fourth] Amendment requires adherence to judicial processes [citation], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . —subject only to a few specifically established and well-delineated exceptions' (*Katz v. United States, supra,* 389 U.S. 347, 357 [19 L.Ed.2d 576, 585, 88 S.Ct. 507].) In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. The trial court thus erred in admitting the evidence found in the trash can." *People v. Edwards,* 71 Cal.2d 1096, 1104-1105 (1969).

Importantly, then, the California High Court reaffirmed *Edwards, supra,* in *People v. Krivda,* the case sub judice, 5 Cal. 3rd 357 (1971), specifically citing pages 1104-1105 of that opinion. It is moreover significant that the Honorable Louis Burke wrote both opinions, assuring a continuity of reasoning.

At Page 364 of Krivda, *supra,* the Court said:

A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a "constitutionally protected area," (see, e.g., cases cited in *People v. Edwards, supra,* 71 Cal.2d 1096). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see *Katz v. United States,* 389 U.S. 347, 350-352 [19 L.Ed.2d 576, 581-582, 88 S.Ct. 507]), and we have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has

been violated by unreasonable governmental intrusion (*People v. Bradley*, 1 Cal.3d 80, 84 [81 Cal. Rptr. 457, 460 P.2d 129]; *People v. Edwards, supra*, 71 Cal.2d 1096, 1104-1105).

The People note that *Edwards* and *Bradley* were decided subsequent to the events which led to defendants' arrest herein and urge that the principles announced in those decisions should be given only prospective effect. However, the "reasonable expectation of privacy" test adopted in *Edwards* and reaffirmed in *Bradley* represented no new constitutional principle which might call into play the various criteria (see, e.g., *Edwards, supra*, at pp. 1107-1108) used for resolving retroactivity problems. Instead, that test was put forth at least as early as *Katz v. United States, supra*, 389 U.S. 347, 353 [19 L.Ed.2d 576, 583], wherein the court held that "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment " and that in the absence of prior judicial authorization the search and seizure were unreasonable. (See also *People v. Edwards, supra*, 71 Cal.2d 1096, 1103-1104; *People v. Terry*, 70 Cal.2d 410, 427 [77 Cal. Rptr. 460, 454 P.2d 36].) (6) We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in *Katz v. United States, supra*, may properly be applied to test the validity of the search and seizure at issue herein.

Similarly, at Page 367, the California Court said:

"It is also clear, as in *Edwards*, that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See *People v.*

Edwards, supra, 71 Cal.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant."

It is thus clear that both *Edwards, supra,* and *Krivda, supra,* now before this Honorable Court, were bottomed upon Article 1, Section 19, of the California Constitution.

As such, this Honorable Court is deprived of jurisdiction to decide any alleged concomitant Federal question. *Fox Film Corporation v. Muller,* 296 U.S. 207, 210 (1935).

IX.

OF PRAGMATISM AND PRACTICALITY.

In its petition for Certiorari (pages 9-10), California asserts that garbage can searching is a vital and important investigative method in combatting clandestine crime. While not pursuing this fallacy in its opening brief, counsel for respondents would be remiss if reflection were not accorded this specious contention.

We must recall that here we are not litigating the constitutionality of the search and seizure of the garbage cans based on a search warrant issued upon probable cause; we are litigating the constitutionality of the indiscriminate, random, chaotic search of garbage cans. No one is seriously denying the police the right to search any can, either independently or as an adjunct to the search of a private home with a search warrant. It is, however, ludicrous to suggest, as does petitioner, that random search of the millions of American garbage cans by police will be a fruitful combative tool to be used

against clandestine criminal activity for the elementary reason that the garbage can/policeman ratio must be astronomical. It is such an elevated ratio that any thinking person would realize its abject futility upon a moment's serious reflective consideration. Moreover, it suggests itself as a frightening misuse of police manpower, which of necessity must and should be devoted to more concrete and burgeoning detective endeavors. The thought of teams of police grovelling in the nation's garbage cans on the nebulous hope that they might find a scrap of incriminating evidence upon which to base some yet unknown charges against unknown persons stretches the logical mind to its breaking point.

Clearly, if probable cause is available to warrant the search of a given specific garbage can, quite the opposite appertains, but then there is no constitutionally sound reason to circumvent the preferred search warrant. *Coolidge v. New Hampshire* (1971) 403 U.S. 443.

Further, it is suggested that the dearth of "garbage can search" decisions in all of the Federal and State Courts in the last three decades presages a total lack of practicality of this type of surreptitious investigative tool. Apparently one can enumerate all of the reported decisions dealing with the subject on the fingers of both hands, hardly suggesting its widespread interest.

Respondents suggest to this Court that among the reasons for expecting privacy or freedom from governmental search in the nation's garbage cans is surely the lack of police manpower to meaningfully implement such a scheme. Even granting a concrete premonition in the mind of a given resident of Waterloo, Iowa, Great Falls, Montana, or Santa Fe, New Mexico that a team of police would, somewhere in those towns, strike on a given day at a given garbage can, the odds at losing in

"Garbage Can Roulette" would be so minuscule as to suggest carefree abandonment of concern. Not only do respondents assert that virtually 100% of the housewives and husbands of this nation blissfully and reasonably believe that the fate of their garbage will be a routine and inconsequential sojourn from garbage can to city dump, respondents also assert that any other belief would be mathematically ridiculous. In this sense, the decision of this Court on reasonable expectation of privacy in garbage cans can be supported on the scientific and mathematical theory of probability; that scientific conclusion can only be that, statistically, each and every one of us can leave for work reasonably knowing that "Garbage Can Roulette" will not decree us a loser to the randomly dispersed police officers who, that day, have fallen heir to the refuse detail.

Statistics aside, these counsel, following inception of affiliation with this case, have with interest interrogated people ranging from airline stewardesses and housewives to both active and retired police; none of those persons have suggested they believe police would be grovelling like hungry animals in their garbage cans.

With full and humble respect to the members of this Honorable Court, respondents suggest a representative statistical sample might be gleaned from the nine spouses of this Court as to what reasonable expectations they may entertain as to the reasonable fate of the week's garbage when it leaves the confines of their residence. Respondents would express surprise if any votes are returned predicting police intervention and scrutiny between kitchen and garbage dump.

Respondents suggest that what waddles like a duck, looks like a duck and quacks like a duck, is usually a duck; what presents itself in the neighborhood appearing

to be a harried and hard-pressed-for-time garbage hauler should be and usually is indeed a hard-working garbage hauler, and not an undercover police agent.

Respondents suggest that it is the zenith of incredulity to believe that a given garbage hauler is a police agent and the "entrusting" to him of the week's garbage is fraught with "misplaced trust". *United States v. White*, 401 U.S. 745, 752 (1971); *On Lee v. United States*, 343 U.S. 747; *Massiah v. United States*, 377 U.S. 201 (1964). Pages 29-30, Petitioner's Opening Brief.

Respondents suggest that the citizens of this nation do not share the "gestapo" mind of petitioner, and, moreover, the vibrant and freedom-loving United States of America is too great a country to need or to desire to require its citizens to be faced with uncertainty of identity of local garbage haulers. To allow warrantless garbage can searches to be a mandate from this Honorable Court, and one that we are to live with in fear henceforth, bespeaks of a 1939 environment on the European continent which respondents believe to have been laid to rest in 1945.

In further assertion in the area of pragmatism, Respondents contend and argue that potentially dangerous avenues of fraud are opened upon the citizens of America, should California prevail before this Court. Apparently California would have this Court sanction the following hypothetical but exemplary procedure, should any unscrupulous person desire to "eliminate" his neighbor or any other citizen from society:

(1) The person initiating the "elimination" process deposits marijuana in the trash can of the party sought to be eliminated;

(2) He then places an anonymous phone call to police specifying that marijuana may be found in the trash can at 123 Mainstreet, Your Town, U.S.A.;

(3) Police immediately converge and locate marijuana in the trash can of the homeowner;

(4) Unless the homeowner can convince the trier of fact that it is not his, he is the new possessor of a felony record. The establishing of innocence is fraught with uncertainty.

Respondents suggest that the implantation of contraband in trash cans is far easier and more prone to abuse than implantation in homes, cars, or on the person, and this Court should not pave the way for such easily enacted and difficult to disprove techniques of fraud.

CONCLUSION

For the foregoing reasons, respondents, JUDITH H. KRIVDA and RODGER T. MINOR, submit that the warrantless search and seizure of their domestic trash can and its contents violated their reasonable expectation of privacy and was therefore in violation of the FOURTH and FOURTEENTH Amendments to the United States Constitution, and the NINTH and TENTH Amendments to the United States Constitution, as coupled with the Los Angeles County/Municipal Ordinances.

Further, the decisions of the California Supreme Court in cases of *People v. Edwards*, 71 Cal. 2d 1096 (1970) and *People v. Krivda*, 5 Cal. 3d 357 (1971) are based upon and supported by independent and adequate state grounds. These state grounds are Article I, Section 19 of the State Constitution, *People v. Cahan*, 44 C.2d 434 (1955), and the local county/municipal garbage can ordinances.

Lastly, it is clear that the repeal of the exclusionary rule must only come via repeal of the FOURTH Amendment and reversal of *Wolf v. Colorado*, 338 U.S. 25 (1949); when the latter remain viable, there is no other realistic modicum of enforcement, save the exclusionary rule.

Respondents urge that the judgment of the California Supreme Court be affirmed and Certiorari dismissed as improvidently granted.

Respectfully submitted,

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APPENDIX A

PROBABILITY OF SUCCESSFUL LOCATION OF CONTRABAND IN TRASH CANS

NOTE 1

For illustrative purposes, if a small community is composed of ten families and one policeman who could search but one can due to the press of other duties on a given garbage pick-up day, the following appertains:

(1) If *all* families dispose of marijuana in the trash can, the probability of any family getting caught is one-tenth; on the other hand, the probability of the policeman being successful is 1/1, i.e., 100% because any can he searches contains marijuana.

(2) If one of ten cans contains marijuana, the probability of the policeman locating the can containing marijuana is one-tenth. The overall probability of the community of families getting caught is one-tenth. The following analysis utilizes exponential notation, i.e.,

$10^1 = 10$, $10^2 = (10)(10) = 100$, $10^3 = 1{,}000$
$10^6 = 1{,}000{,}000$ and so forth.

For a community such as Los Angeles containing roughly three million persons and having a police force of 7,000, similar analysis appertains:

(1) If the average family has four people, there are

$$\frac{3(10^6)}{4} = .75(10^6) \text{ families;}$$

(2) If each family has at least one can (and many have multiple cans, of course), then there are roughly (10^6) garbage cans in Los Angeles.

(3) If but 100 policemen can be devoted to the garbage can search detail, the probability of any one of the 10^6 families getting caught, assuming all families dispose of marijuana in the garbage can is

$$\frac{10^2}{10^6} = \frac{1}{10^4}$$

or one in 10,000, while the probability of the police being successful remains 1/1, or perfect, as *all* cans contain marijuana. On the other hand, if but 1/100 of the cans contain contraband, the overall probability of the marijuana disposing families getting caught is 1/100 assuming but one possible police contact per disposal day in the community. Doubling the police *or* the cans contacted places 2/100 or 1/50 as the probability of someone getting caught. Going to the extreme of increasing the police 100-fold, or the can contacts 100-fold, again restores the probability of someone getting caught to 100%, or perfect chances of a marijuana disposing family getting caught. There is, however, no certainty of anyone getting caught. It is to be emphasized that the *probability*, not the *certainty*, rises to 100%. This means that when flipping a coin, the probability of obtaining a head in a single toss is 1/2 or 50%; it does not mean that if a tail is attained the first time, then there is a *certainty* of a head occurring on the second toss in order to meet, in two tosses, the mathematical *probability* of 50%. In other words, probabilities are based on an immense number–theoretically an infinite number–of tosses. Indeed, one might flip a coin ten consecutive times and obtain ten consecutive tails; on the eleventh

toss, the probability of obtaining a head is still 1/2 or 50%. It does mean, however, that in a huge number of attempts, say $(10)^6$, one would probably obtain 5 (10^5) tails and a like number of heads. *Probability*, then, must clearly be distinguished from *certainty*.

If one assumes, arguendo, based on the above analysis, that there is a probability that 1/100 garbage cans contain marijuana or other contraband, it is apparent that this ratio alone is not promising for portending success in locating the magic can. The *certainty*, of course, is never present unless all cans are searched.

Proceeding, however, from this assumed probability of (1/100), consider the search of the garbage can sitting undefended at curbside:

(1) Assume that of the cans commenced search, one of two present such offensive odors that even the most stalwart detective gives up; i.e., the probability of completion is (1/2);

(2) Assume that of each can commenced search, the homeowner notices the act of search and halts the procedure in 1/2 times;

(3) Assume that of those totally searched, the item of "contraband" is only "recognized" and hence seized in only one of five cans, i.e., the probability of seizure is (1/5);

Thus, with the foregoing simple figures, the probable likelihood of success is (1/100) (1/2) (1/2) (1/5)=1/2000, hardly bespeaking for optimistic "garbage can roulette."

NOTE 2

Thus, we might assume that the chances of convincing garbage haulers to violate the law and permit police rummaging and garbage tampering might be confined to one of four haulers; this boosts the inherent probability of privacy to one in 8,000. Further, of those haulers cooperating, assume only in one of two occasions were the police able to time their contact sufficiently opportunistically to intercept before the garbage was elevated from the "bin" into the truck. The odds then rise to one in 16,000. Obviously, police could not perpetually be successful in slowing down the process of garbage pickup to effect their "bin" examination, for the harried haulers eventually would likely opt to complete their rounds rather than participating in playing detective.

While counsel quickly admits the lack of basis for the numerical values, it is readily seen that the power in the analysis comes not so much from the accuracy of the individual numbers, but from the shockingly large number resulting from the *product* of the individual probabilities; several of them could be adjusted more favorably to the police and yet the *product* remains extremely large. See, *People v. Collins*, 68 Cal. 2d 319, (1968) for an excellent example of this technique.

APPENDIX B

PARTIAL OPINION
PEOPLE v. CAHAN, 44 Cal. 2d 434 (1955)

"Meanwhile, pursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule. It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence. (See *MacNabb v. United States*, 318 U.S. 332, 341 [63 S.Ct. 608, 87 L. Ed. 819]; *On Lee v. United States*, 343 U.S. 747, 756 [72 S.Ct. 967, 96 L. Ed. 1270].)

The rule admitting the evidence has been strongly supported by both scholars and judges.* (Footnote omitted). Their arguments may be briefly summarized as follows:

The rules of evidence are designed to enable courts to reach the truth and, in criminal cases, to secure a fair trial to those accused of crime. Evidence obtained by an illegal search and seizure is ordinarily just as true and reliable as evidence lawfully obtained. The court needs all reliable evidence material to the issue before it, the guilt or innocence of the accused, and how such evidence is obtained is immaterial to that issue. It should not be excluded unless strong considerations of public policy demand it. There are no such considerations.

Exclusion of the evidence cannot be justified as affording protection or recompense to the defendant or punishment to the officers for the illegal search and seizure. It does not protect the defendant from the search and seizure, since that illegal act has already occurred. If he is innocent or if there is ample evidence to convict him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all. Thus the only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence. Allowing such criminals to escape punishment is not appropriate recompense for the invasion of their constitutional rights; it does not punish the officers who violated the constitutional provisions; and it fails to protect society from known criminals who should not be left at large. For his crime the defendant should be punished. For his violation of the constitutional provisions the offending officer should be punished. As the exclusionary rule operates, however, the defendant's crime and the officer's flouting of constitutional guarantees both go unpunished. 'The criminal is to go free because the constable has blundered' (Cardozo, J., in *People v. Defore, supra*, 242 N.Y. 13, 21), and 'Society is deprived of its remedy against one lawbreaker, because he has been pursued by another' (Jackson, J., in *Irvine v. California, supra*, 347 U.S. 128, at 136; see also 8 Wigmore on Evidence [3d ed.] § 2184, p. 40.)

Opponents of the exclusionary rule also point out that it is inconsistent with the rule allowing private litigants to use illegally obtained evidence (see *Munson v. Munson*, 27 Cal. 2d 659, 664 [166 P.2d 268]; *Oil Workers Int'l Union v. Superior Court*, 103 Cal. App. 2d 512, 579-580 [230 P.2d 71]; *cf., Herrscher v. State Bar*, 4 Cal. 2d 399,

412 [49 P.2d 832]), and that as applied in the federal courts, it is capricious in its operation, either going too far or not far enough. '[S]o many exceptions to [the exclusionary] rule have been granted the judicial blessing as largely to destroy any value it might otherwise have had. Instead of adding to the security of legitimate individual rights, its principal contribution has been to add further technicalities to the law of criminal procedure. A district attorney who is willing to pay the price may easily circumvent its limitations. And the price to be paid is by no means high.' (Grant, *Circumventing the Fourth Amendment*, 14 So. Cal. L. Rev. 359.) Thus, the rule as applied in the federal courts has been held to protect only defendants whose own rights have been invaded by federal officers. If the illegal search and seizure have been conducted by a state officer or a private person not acting in cooperation with federal officers, or if the property seized is not defendant's the rule does not apply. (*Burdeau v. McDowell*, 256 U.S. 465 [41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159]; *Lustig v. United States*, 338 U.S. 74, 78-79 [69 S.Ct. 1372, 93 L.Ed. 1819]; *Connolly v. Medalie*, 58 F.2d 629; *Kelley v. United States*, 61 F.2d 843; *Parker v. United States*, 183 F.2d 268; *Steeber v. United States*, 198 F.2d 615; *United States v. Stirsman*, 212 F.2d 900; *cf. Gambino v. United States*, 274 U.S. 310 [48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381].)*"

*Since it was determined in *Wolf v. Colorado, supra*, 338 U.S. 25, that the Fourth Amendment prohibitions are applicable to state officers, it may be that evidence secured illegally by state officers is no longer admissible in federal courts. (See Murphy, J., concurring in *Lustig v. United States*, 338 U.S. 74, at p. 80 [698 S.Ct. 1372, 93 L.Ed. 1819]. 'In my opinion the important consideration is the presence of an illegal search. Whether state or federal officers did the searching is of no consequence to the

defendant and it should make no difference to us.' See also *McDonald v. United States*, 335 U.S. 451, 456 [69 S.Ct. 191, 93 L.Ed. 153]; *United States v. Jeffers*, 342 U.S. 48 [72 S.Ct. 93, 96 L.Ed. 59]; Allen, *The Wolf Case*, 45 Ill.L.Rev. 1, 24.)

A distinction with respect to evidence illegally obtained by private individuals may be justified by the fact that the constitutional provisions only proscribe governmental action. 'It is one thing for the government to take advantage of information which one wrongdoer reveals of another, or the revelations which ensue when thieves fall out, and quite another thing for the government to condone or encourage a violation of the law by officers sworn to observe and enforce the law. If peace officers are rewarded for breaching the peace, what more potent influence could induce people generally to hold the law in contempt and to break through legal barriers which stand across the path of their desires!' (*State v. Owens*, 302 Mo. 348, 377 [259 S.W. 100, 32 A.L.R. 383]; see also Allen, *The Wolf Case*, 45 Ill. L. Rev. 1, 23.)

APPENDIX C

RECENT RULINGS TURNING ON THE CONCEPT OF REASONABLE EXPECTATION OF PRIVACY

The California Supreme Court has logically applied the reasonable expectation of privacy test to several factual situations. *People v. Bradley*, 1 Cal. 3d 80 (1969) (no reasonable expectation of privacy in marijuana plants growing in the open near the sidewalk although located in a private home's backyard). *Dillon v. Superior Court*, 7 Cal. 3d 305 (1972) (no right of privacy in growing marijuana plants in backyard in plain view from the second floor bedroom of neighboring house, reported by neighbor). *People v. Sirhan*, 7 C.3d 369 (1972) reflects the California High Court's realistic approach to trash lying in the *open*, uncanned, in the backyard, exposed to whoever had the right to be there to see it. (No right to privacy where policeman saw letter lying in open view in trash while stationed to protect home and insure privacy of mother of alleged assassin of Senator Robert F. Kennedy.)

Likewise, our Courts of Appeal have found no privacy where matters have been exposed to open view. *People v. King*, 5 Cal. App. 3d 724 (no right to privacy in stolen property in plain sight in backyard observed by police walking up driveway in the course of investigating another felony). Even if an officer may have committed a trespass, his observations of matters *in plain view* are under some circumstances admissible. *People v. Doyle A. Terry*, 70 Cal. 2d 410, 427, 428 (1971). (No reasonable expectation of privacy in marijuana cigarette lying in plain sight in a closed but locked automobile, where said

car was viewed in a subterranean parking garage open to all tenants in a multi-unit apartment house.)

It is, however, clear from all of the above, that under California analysis the matter of plain sight as opposed to necessity to enter the opaque container, if any, is one of the distinguishing factors as to reasonableness. Some other jurisdiction may not agree, but, nonetheless, the California Courts are free, under the Fourth Amendment, to protect to the extent they desire the citizens of this state.

It is, therefore, quite readily apparent that California search and seizure law precludes search into closed opaque containers without a search warrant. The closed family garbage can, an adjunct to the domestic scenario, is so protected. *Edwards*, 71 Cal. 2d 1096; *Krivda*, 5 Cal. 3d 357.

Lest this Honorable Court feel that the California garbage can is automatically a word of magic to always insure privacy, respondents cite *People v. Superior Court*, (*Barrett*) 23 C.A. 3d 1004 (1972) (clearly distinguishing *Edwards, supra, Krivda, supra*) in which it was held there was no expectation of privacy where occupant of home, believing police were in hot pursuit, and while fleeing, placed narcotics contraband in neighbor's garbage can; there was no "search" of the trash can, merely a retrieval of a bag seen placed therein with probable cause to believe that bag contained contraband.

Obviously, *Barrett*, *supra*, is clearly analogous to the espoused doctrine of *Hester v. United States*, 265 U.S. 57 in the "hot pursuit" aspects; the discard of contraband in the view of police hardly bespeaks of an expectation of privacy, and discarding the contraband into a *neighbor's* garbage can under patently suspicious circumstances did not protect it.

In a well reasoned opinion, the United States Court of Appeals for the Ninth Circuit found a reasonable expectation of privacy in Christmas Trees cut and stolen from their place of growing when these trees were placed behind a motel although remaining in plain sight. *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968). While *Wattenburg*, *supra*, deemphasized the "curtilage" and "open fields" concepts of *Hester v. United States*, 265 U.S. 57, the Court cited with approval *United States v. Potts*, 297 F.2d 68, 69 (6th Cir.):

> "Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling and is habitually used for family purposes. . . ."

The latter Federal authority surely suggests that the domestic garbage can, necessary and convenient and used for family purposes, is within the curtilage and is entitled to protection.

Similarly, the *Wattenburg* Court approvingly cited *Care v. United States*, 231 F.2d 22, 25 (10th Cir.):

> "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family. . . ."

The fact that the garbage can in the case *sub judice* was at curbside was, of course, occasioned solely by the necessity for pick-up; it otherwise is surely "an adjunct to the domestic economy of the family. . . ."

Wattenburg, *supra*, gives the critical federal standard

> "... a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden, is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public ..." (388 F.2d 853, 857)

This Court has aptly delineated the purposes of the Fourth Amendment in *Camara v. Municipal Court*, 387 U.S. 523, 528:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. ..."

Having established that Respondents entertained a reasonable expectation of privacy in their domestic trash container, it is difficult to imagine a more arbitrary invasion thereof than the planned utilization of the garbage haulers as police agents in effecting a search of Respondents' can.

Respondents suggest that the foregoing exemplary authority ordains that their domestic garbage can, a necessary adjunct to the domestic homelife scenario, be granted full Fourth and Fourteenth Amendment protection.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

—v.—

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

—v.—

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

Interest of *Amicus Curiae**

The American Civil Liberties Union is a nation-wide, non-partisan organization with over 170,000 members in the United States. Its affiliates in California are the ACLU of Southern California, and the ACLU of Northern California. The ACLU is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-two year existence, the ACLU has been concerned with both the integrity of the judicial process and the protection of Fourth Amendment rights from the unlawful actions of state and federal officials.

These cases present significant issues concerning the substance and sanctions of the Fourth Amendment. At stake are the integrity of the criminal justice process and the effective protection of Fourth Amendment rights, not only for those charged with and prosecuted for crimes, but for us all.

On the issues presented as to the scope of the substantive protections of the Fourth Amendment, we would like to associate with the ably presented positions of Respondents. Our sole purpose is to suggest several additional considerations concerning the exclusionary rule to guide the Court should it reach those issues.

Summary of Argument

The exclusionary rule gives substance to the individual's rights to be free from unreasonable search and seizures in two ways: (1) it serves to uphold the integrity of the courts and the criminal justice system; and (2) it deters the law

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

enforcement apparatus from gathering evidence of criminal conditions by unconstitutional means.

I.

The exclusionary rule derives from the Constitution and not solely from the Court's supervisory power. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Thus the rule compels the Court to shun knowing collaborations in the deprivation of constitutional rights, regardless of how inadvertent the initial violation of rights may have been. Citizens are assured that whatever improprieties occur on behalf of the executive branch of government, the courts will not participate in furthering the injury.

II.

Deterrence is effected by rendering conviction on the basis of illegally seized evidence impossible. Recent evidence shows that as police departments become more professional, conviction rates become a more significant index of success in police work. The exclusionary rule has encouraged and continues to encourage the trend toward professionalization of the police. Without the absolute exclusion of illegally seized evidence, police will be encouraged by the dictates of efficiency to ignore constitutional values.

III.

The "substantial violation" rule proposed by Petitioners in *Krivda* as a substitute for the exclusionary rule would impugn the integrity of the courts and would substantially eviscerate the deterrent effect of the current rule. Measured against Petitioner's own criticisms of the exclusionary rule, the "substantial violation" rule would exacerbate the difficulties police and courts have and would have under the

exclusionary rule. Furthermore, the "substantial violation" rule would turn court attention from the protection of the individual's rights to a determination of the fault of the police, thus putting the police on trial rather than the defendant.

IV.

Finally, Petitioner's suggestion that exclusionary rule claims be made unavailable to state prisoners seeking federal habeas corpus relief would wreak havoc with this Court's precedential development of the Great Writ. See, e.g. *Fay* v. *Noia*, 372 U.S. 391 (1963). Nor are the causes of judicial integrity or deterrence served by this illogical distinction between collateral attack and direct appeal. The principal impact of such a distinction would be to deprive most state criminal defendants of a federal forum for adjudication of their federal rights, thereby undermining what even severe critics agree is a primary benefit of the exclusionary rule.

ARGUMENT

Preliminary Statement

To argue that the exclusionary rule fails to protect adequately the constitutional rights of citizens is to state the obvious. Yet to argue that the rule fails to protect the rights of anyone would be false. Rather, the argument against the exclusionary rule seems to turn on its presumed failure directly to protect anyone other than those accused of crime. We do not agree with this analysis. But even if the assumption is made *arguendo*, the degree of constitutional protection that obviously is afforded by the exclusionary rule justifies its continued existence.

Despite the existence of criminal activity in every socio-economic stratum of our society, the primary clientele of the criminal justice system are drawn from the lowest stratum. *President's Commission on Law Enforcement and Administration of Justice,* THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), at 43-45. They are the very young, the poor, the powerless. By reason of their ignorance, their lack of professional assistance, or plea bargains struck on their behalf, they are the persons most easily dissuaded from pursuing affirmative remedies to redress violations of their constitutional rights. Their plight is least visible to those who mold public opinion. Indeed, public opinion will most likely demand that they be dealt with harshly and efficiently. Hence without the exclusionary rule they are without any defense against the unconstitutional intrusions of state and federal officers. But the success of a democracy is measured by the quality of life of its most oppressed citizens. What this Court does to protect the rights of the most wretched criminal will symbolize to the country and the world the extent of individual liberty in the United States. See, e.g., T. Arnold, *The Criminal Trial as a Symbol of Public Morality,* in CRIMINAL JUSTICE IN OUR TIME 137 (Howard ed. 1965); S. Rosen, *Contemporary Winds and Currents in Criminal Law, With Special Reference to Constitutional Criminal Procedure,* 27 MD. L. REV. 103, 108-114 (1967). Thus we urge this Court to stand firmly in support of the exclusionary rule of the Fourth Amendment.

I.

The exclusionary rule is constitutionally compelled and is essential to the integrity of the courts and the criminal justice system.

Petitioners direct their attack upon the exclusionary rule to the issue of deterrence, deliberately failing to acknowledge that they are asking this Court to participate in and sanction prosecutorial deprivations of constitutional liberties. It has long been settled that courts cannot wash their hands of the manner in which evidence is brought before them. E.g., *McNabb* v. *United States,* 318 U.S. 332 (1943). To find on the one hand that the state has violated a defendant's Fourth Amendment rights in obtaining evidence against him, and then to find on the other hand that his conviction based upon such evidence has been obtained consistent with the requirements of due process of law is unacceptable logic. This Court cannot pretend to uphold the Constitution when it lends its offices to such use of illegally seized evidence. In the strictest sense, this Court did not fashion a remedy for illegal searches and seizures when it enunciated the constitutional requirement of the exclusionary rule in *Weeks* v. *United States,* 232 U.S. 383 (1914) and again in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). It merely stated its refusal consciously to facilitate and reward the unconstitutional activities of the executive branch. What was true for Mr. Justice Brandeis in 1928 is even more appropriate today when the integrity of governmental institutions is being questioned from all quarters:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupu-

> lously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

Some critics have argued that the exclusionary rule was a product of the Court's supervisory power and is not constitutionally compelled, despite the clear language of *Weeks* in which Mr. Justice Day found the trial court's refusal to suppress illegally obtained evidence "a denial of the constitutional rights of the accused." 232 U.S. at 398. The Court appeared to waver on this issue in *Wolf* v. *Colorado,* 338 U.S. 25 (1949), but in *Mapp,* Mr. Justice Clark repeatedly emphasized the constitutional basis of the exclusionary rule:

> There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. 367 U.S. at 649.

Petitioners argue that the integrity—or at least the popularity—of the courts is under attack because some criminals

go free as a result of the exclusionary rule. When the exclusionary rule is virtually the only mechanism through which violations of individual rights are vindicated, popular feeling for the courts and for the rights they protect may well be affected. But any current misunderstanding of the protection against unlawful searches and seizures or the exclusionary rule is not caused by our constitutional tradition of judicial responsibility. Rather, the fault lies with the executive and legislative branches of government which have neglected the establishment of other effective civil and criminal remedies against unconstitutional police conduct. If the exclusionary rule standing alone distorts the public's picture of what the Fourth Amendment is all about, it must be supplemented—not watered down or abandoned—to teach the public the value of individual liberty.

II.

The exclusionary rule is a necessary condition for effective deterrence of illegal police conduct.

Our thesis is simple: this Court has been correct in holding since 1914 that the exclusionary rule is a necessary first condition in any judicial program to deter illegal police conduct.

It is important to recognize at the outset that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice apparatus. Thus the exclusionary rule is not truly a sanction directed at the individual police officer, either by its terms or by its effect—hence the absence of any terms placing "blame" on the police officer. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the magistrate, to the prosecutor, to the trial judge. Indeed, one of the difficulties in tracing the deterrent effect of the rule is that each of the participants in the criminal justice process is reacting to a different set of goals and group norms. See, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 149-60 (1969); H. Packer, *Two Models of the Criminal Process,* in THE LIMITS OF THE CRIMINAL SANCTION, pp. 149-73 (1968). The exclusionary rule focuses on one goal more or less common to all aspects of the system—the conviction of offenders—but fails to address other goals held by different agencies within the system.

Police have as their primary goal the detection and control of criminal conduct. One of a number of methods of

achieving this goal is to place as many criminals as possible behind bars, a technique best accomplished by making a "good pinch," i.e. an arrest leading to conviction of the offender. To be sure, other methods exist by which the police may achieve their goal in whole or in part, including harassment of petty offenders, confiscation of contraband, and use of the threat of arrest to obtain underworld informers, to name a few. Deterrence of these and other techniques of crime control, which may involve unconstitutional police practices, generally requires sanctions other than the exclusionary rule.

It is important to acknowledge that the generalized goals of crime control often conflict with values of the Fourth Amendment. H. Packer, *Two Models of the Criminal Process, supra;* J. Skolnick, JUSTICE WITHOUT TRIAL, 220 (1966). Individual police officers may, in their roles as citizens, sense some compunctions about breaking into a private residence without a warrant, but the demands of their jobs conflict with such scruples. It is only when such values are translated into the values associated with good police work that they become effective influences upon police conduct:

> My observations suggest . . . that norms located within police organization are more powerful than court decisions in shaping police behavior, and that actually the process of interaction between the two accounts ultimately for how police behave. This interpretation does not deny that legal rules have an effect, but it suggests that the language of courts is given meaning through a process mediated by the organizational structure and perspectives of the police. J. Skolnick, JUSTICE WITHOUT TRIAL, *supra,* 219-20.

We draw two conclusions about the utility of the exclusionary rule from Skolnick's observation: (1) without sanctions such as the exclusionary rule, court pronouncements on the meaning of the Fourth Amendment will fall on deaf ears as they did prior to *Mapp;* and (2) any failings of the exclusionary rule to date can be ascribed to shortcomings in the translation of judicially articulated values to police work values. The latter point receives substantiation from LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions,* 63 MICH. L. REV. 987, 1012 (1965):

> As for the exclusionary rule, its limited impact [on police officials] is attributable in large measure to inadequate communication between the police and the courts.

One solution is for prosecution and police officials to educate the police officer on the beat as to his constitutional obligations. Much has been accomplished in the last five years. Since the President's Commission on Law Enforcement and Administration of Justice proposed in 1967 that all police departments employ full or part-time legal advisers (THE CHALLENGE OF CRIME IN A FREE SOCIETY, 114), over 100 metropolitan police departments have established such positions. One function for these advisers, only recently coming into vogue, has been to make rules for police conduct in typical, on-the-street situations. Police training manuals have likewise undergone substantial revisions with new emphasis being placed on constitutional and statutory obligations in police work. Progressive departments are encouraging their officers to take on new training and education programs which, among other things, sensitize police

officers to the mandates of the Constitution. And in Washington, D. C., the police are experimenting with an even more far-reaching mechanism for the legal education of their officers, described by Chief Jerry Wilson and Department General Counsel Geoffrey Alprin in an article soon to be published in LAW AND CONTEMPORARY PROBLEMS:

> In the District, we have recently begun an experiment for surfacing, for the benefit of higher officials in the Department, those non-prosecuted cases which before have never reached the attention of the courts and seldom have been reviewed within the Department. In cooperation with the local United States Attorney's Office, the Department has created a specialized unit, staffed with police officials, with responsibility for reviewing every case which is dropped by the prosecutor, for whatever reason. Errors in police procedures, whether of exclusionary rule character or not, are brought to the attention of the offending officer and his commanding official, who is required to insure that the officer is counselled and instructed in proper processes. The Case Review Section maintains records by officer and unit so that recurrent patterns of misconduct or procedural error can be observed and corrected. In those areas where direct Department orders apply, as, for example, the identification of automobile search orders, egregious or repetitive errors may be dealt with through the Department's disciplinary processes. To offset particularly significant patterns adversely affecting prosecution of cases, members of the Section regularly instruct recruit and in-service training classes at the Department's Academy. Statistics are maintained by the Section and are available to the public.

We join with the *amicus* brief of Americans for Effective Law Enforcement (AELE) in noting the rising degree of professionalism in police departments around the country. Unlike that organization, however, we recognize the role the exclusionary rule has played both in initiating the trend and in maintaining it. What the description of Wilson and Alprin tells us is that the better-run police departments in this country place a very high value indeed on conviction rates. The Case Review Section was born out of a desire to reduce the "no paper" or no court action rate of the prosecutor's office, estimated by the authors at better than twenty per cent (see also, "1 in 5 Charges Dropped," The Washington Post, March 29, 1972, §C at p. 1, col. 8), a substantial portion of which results from exclusionary rule violations. We believe that the exclusionary rule is largely responsible for bringing police departments out of the dark ages of the third degree, that police departments are becoming increasingly sensitive to constitutional limitations as they affect conviction rates (and not out of any new-found altruism), and that future refinement of police procedures is largely dependent on retention of the exclusionary rule and the addition of affirmative sanctions and remedies for gross forms of police negligence and willful misconduct.

For police departments less professional than that of the District of Columbia, the exclusionary rule may play a less significant deterrent role because of the reduced emphasis on conviction rates as an index of police success. But for this Court to modify or remove the constitutional requirement of the exclusionary rule is to tell more progressive departments that they may increase efficiency without refining police procedures to protect the rights of citizens.

Such an alteration of the rule would retard progress where it is now under way, while having little or no effect on the operations of less professional police departments.

To suggest, as does the AELE (*amicus* brief at 18-19), that police are just as likely to behave constitutionally without the exclusionary rule because of internalized notions of professionalism is to deny what every police officer and every citizen knows: police observance of Fourth Amendment safeguards is inefficient in that it requires police to make greater allocation of energy, than would be true in their absence, to achieve proper law enforcement goals. Professionalism in police work, as in most occupations, places a high premium on efficiency, and indeed most criticisms of the exclusionary rule center on the inefficiency it produces in law enforcement efforts. Due process and efficiency in law enforcement are necessarily conflicting goals, and the AELE knows it.

To suggest, as does the Attorney General of Illinois (*amicus* brief at 7-8), that police misconduct can be effectively controlled by community opinion is utterly baseless and is contrary to this Court's long experience in reviewing police procedures. The primary clientele of the criminal justice system comes from the lowest socio-economic classes, many of whom are members of racial minorities. The Challenge of Crime in a Free Society, *supra*, 44-45. This group (and police practices toward them) is the least visible of any in our society to those who lead community opinion. The average criminal defendant is as powerless as almost anyone in America; he is the one most in need of precise, prophylactic constitutional rules.

Finally, we are unable to report any empirical studies of satisfactory methodology which indicate either the exist-

ence or absence of deterrence of unconstitutional police practices as a result of the exclusionary rule. The most ambitious of these studies, though appended by many harsh words for the exclusionary rule, proves nothing:

> . . . The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970).

Nor do the figures of the AELE on appellate cases (*amicus* brief at 12-17) prove anything about current levels of police compliance with court rulings. Many cases of police misconduct never reach the charging stage. Of those that do, many are dropped immediately by the prosecutor, some by reason of patently illegal police conduct. Of those prosecuted, roughly 90% result in guilty pleas; and of these cases, many have been plea bargained for a reduced charge because there existed in the case a viable exclusion of evidence issue. Of the remaining cases, most are resolved at trial without appeal. Thus AELE has succeeded only in demonstrating that in the scale of virtues of criminal defense attorneys, tenacity can lead to one's client's freedom.

Thus the evidence on deterrence is summarized simply. On the one hand, increasing professionalism in police departments across the country shows a higher value being placed on conviction rates, the police goal most directly influenced by the exclusionary rule. On the other hand, no satisfactory empirical study exists to prove whether the rule does or does not deter. We believe the inadequacies of

statistical studies are insufficient reason to abandon a rule which makes good common sense as well as at least symbolizes and possibly vindicates the unquestioned constitutional values of the Fourth Amendment.

III.

Petitioners' "substantial violation" test would reduce deterrence and create confusion for the courts.

Petitioners' proposal of a "substantial violation" test is certainly not very original. Their sketch of "the substance of the criteria" of § 8.02(2) of the American Law Institute, Model Code of Pre-Arraignment Procedures, p. 23 (Tent. Draft No. 4, 1971) (Pet. Brief in *Krivda* at 51-52), is nothing more than a warmed-over version of the "shocks the conscience" test put to rest by this Court in *Mapp*.

At the outset it is necessary to expose petitioners' rather deceptive allusion to the ALI proposal. Petitioners' proposed rule may represent "the substance of the criteria" of the ALI proposal (Pet. Brief in *Krivda* at 52, n. 6), but the differences between the two are far more substantial than the similarities. The ALI version purports to effect no changes in the essential *Mapp* rule requiring automatic exclusion of evidence seized in violation of the Fourth Amendment. The ALI "substantial violation" rule is aimed only at those violations of the Model Code's provisions which are not of constitutional dimension. Petitioners' proposed rule, however, would apply to *constitutional* violations, thereby requiring the Court to overrule *Mapp*. This rule is more closely related to Senate Bill No. 2657, 92nd Congress, 1st Session, which likewise ignores the subtleties of the ALI position. Petitioners are in good company, however, as

Professor Charles Alan Wright, normally a more careful scholar, has committed the same oversight. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 745 (1972).

Unlike the ALI proposal which purports to add to the exclusionary rule, Petitioners' proposal would gut it. Petitioners and their allies would ask the trial courts in suppression hearings to balance such criteria as the willfulness of the police misconduct and the extent to which the police conduct deviated from Fourth Amendment norms. The Attorney General of Illinois even suggests (*amicus* brief at 12) that the trial judge take into account the seriousness of the crime charged, a criterion which, as a matter of practicality, also lurks in the background of petitioners' statement of the proposed rule.

Amici find it curious that petitioners' proposed rule, when considered against the backdrop of the many criticisms of the current exclusionary rule, not only fails to resolve those criticisms, but actually exacerbates them. Consider the following:

1) Critics charge that under the exclusionary rule, the policeman rather than the criminal is on trial.

Response: The "substantial violation" rule focuses court attention on the degree of the policeman's fault in conducting the illegal search and seizure. The officer is required to defend his judgment and his good faith in executing the search and seizure. If the violation is truly substantial, the officer may take refuge in perjury or he may be well-advised to invoke the privilege against self-incrimination in the

suppression hearing. If the seriousness of the defendant's alleged crime is to be taken into account, either explicitly or implicitly, the suppression hearing will become a battle over whose offense was greater, that of the defendant or that of the police officer. It is unreasonable to assume that the defendant would ever win such a contest. The fault of the officer is relevant to civil and criminal litigation and department disciplinary proceedings against him, but is irrelevant to the issue of suppression.

2) Critics charge that the exclusionary rule does not deter because no police officer can understand or keep up with all the case law on the Fourth Amendment.

Response: Under the "substantial violation" rule, the officer must learn not only the substantive law of the Fourth Amendment, but he must be well acquainted with the predilections of local judges in finding what constitutes a "substantial violation" of the Fourth Amendment. If the substantive law of the Fourth Amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what "substantial violation" means. Courts will be asking themselves whether the police officer conducted a "reasonable or unreasonable" unreasonable search and seizure. It is difficult to imagine a rule which would cause greater confusion to the average police officer.

3) Critics charge that the exclusionary rule generates countless pre-trial suppression motions which delay trial of the offender, thereby diluting the efficacy of the criminal sanction.

Response: Criminal defendants will be just as willing to file suppression motions under the "substantial violation" rule. Pre-trial hearings on such motions are likely to become more complex than they are now under the relatively simple, automatic exclusionary rule. In addition, if interlocutory appeals of pre-trial suppression hearings are permitted, as some have proposed, the criminal process will become even more drawn out then it is today.

4) Critics charge that the exclusionary rule encourages police perjury.

Response: Under the "substantial violation" rule, police will have even greater reason to perjure themselves, since civil and criminal litigation and department disciplinary proceedings may ensue. In addition, the flexibility and subjectivity of the proposed rule makes perjury easier. Nor can we feel any better about honest and open violations of the law about which the courts can do nothing.

5) Critics charge that the exclusionary rule encourages police officers to engage in harassment and other law enforcement tactics which do not anticipate formal arrest and prosecution.

Response: Under the "substantial violation" rule, police officers will receive even greater encouragement to employ such tactics, knowing that a suppression hearing may implicate them for civil and criminal litigation and for department disciplinary proceedings.

6) Critics charge that since the exclusionary rule is only minimally effective, we should try something different.

Response: The "substantial violation" rule has been tried at the Supreme Court level and has been found unworkable because of its subjectivity. *Rochin* v. *California,* 342 U.S. 165 (1952); *Irvine* v. *California,* 347 U.S. 128 (1954). The chaos which would ensue were it to be attempted by trial judges around the country ruling in suppression hearings is almost inconceivable.

In short, we urge that adoption of the hastily contrived "substantial violation" rule would come close to eliminating whatever deterrence the exclusionary rule provides, would cause chaos in the trial and appellate courts, and would fail to ameliorate—and in most cases would exacerbate—the unfortunate side effects of the exclusionary rule which critics have set forth to date.

IV.

There is no reason in law or policy to distinguish between trial and habeas corpus in applying the exclusionary rule.

What petitioners could not accomplish at trial, this Court should not permit them to achieve by limiting collateral attack. *Kaufman* v. *United States,* 394 U.S. 217 (1969), one of a number of cases which petitioners ask the Court to overrule (Petitioners' Brief in *Bustamonte* at 25), is of only marginal relevance to the issue now before the Court. (In *Kaufman,* this Court recognized the right of federal prisoners to raise exclusionary rule issues collaterally.) Petitioners' argument to make claims based on the exclusionary rule unavailable to state prisoners in federal habeas corpus strikes at the very heart of the Court's extensive development of the Great Writ. Cf. *Moore* v. *Dempsey,* 261 U.S. 86 (1923); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Brown* v. *Allen,* 344 U.S. 443 (1953); *Fay* v. *Noia,* 372 U.S. 391 (1963).

We need not duplicate respondent's excellent, concise history of the development of the Writ (Respondent's Brief in *Bustamonte* at 21-28). We shall only highlight by noting that the point at which the Court turned the corner on opening federal habeas corpus "to inquire into every constitutional defect in any criminal trial" (*Williams* v. *United States,* 401 U.S. 646, 685 (1971) (Harlan, J., concurring and dissenting)) occurred definitively in *Brown* v. *Allen, supra,* which in turn was largely guided by the result in *Moore* v. *Dempsey. Kaufman* is no more than a recent, logical application to collateral attacks by federal prisoners of the

principles set out in *Moore, Brown,* and *Fay* v. *Noia, inter alia.*

Recent growth in the habeas corpus docket of the federal courts can be traced in large part to elaborate judicial development of the substantive meaning of the Fourth Amendment. Constitutional issues in criminal proceedings have become more complex since *Brown* v. *Allen* and have created greater divisions within the Court, thereby spawning more extensive litigation. But the basic principle of *Moore* and *Brown* and the policy reasons which support it (ably presented in Respondent's Brief in *Bustamonte* at 28-31) have remained unchanged. To exclude exclusionary rule claims from consideration in collateral attack would remove from federal district court jurisdiction many of the constitutional issues which have arisen in criminal proceedings in the last decade, most of which find no other vehicle to reach the federal courts. The Court would deprive litigants of a lower federal forum for the resolution of these complex constitutional issues and, at the same time, would increase pressure on its own docket to resolve these issues itself on appeals from state courts. Even the most outspoken critics of the exclusionary rule have conceded its virtue as:

> . . . a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Oaks, *op. cit. supra,* at 756.

Petitioners further muddy the water by taking out of context the words of California Chief Justice Roger Traynor in *In re Sterling,* 63 Cal.2d 486, 47 Cal. Rptr. 205, 407 P.2d 5 (1965) (Petitioners' Brief in *Bustamonte* at 26-27). In *Sterling,* petitioners' request for *state* habeas corpus relief was denied after direct appeals on the identical constitutional issue had been turned down. Chief Justice Traynor noted that petitioners had had their day in state courts on the issue, and that petitioners' proper remedy lay in federal habeas corpus. Far from supporting Petitioners in the instant case, *Sterling* indicates the reliance of state court judges on the federal district court habeas corpus jurisdiction to give federal answers to federal questions.

What deterrence occurs as a result of the exclusionary rule, occurs equally whether the final judicial word in a given case comes from this Court, a federal district court, a state supreme court, a trial court, or from the prosecutor's office when a case is "no-papered." The issue of how a court's pronouncements on the exclusionary rule reach the police officer on the beat is not affected by which court renders the final judgment, but rather by factors pertaining to internal police administration. Petitioners have come up with no new distinctions of law in this case; they are very simply attempting to have the Court gut the exclusionary rule through a circuitous route. Their objective is wrong, for the reasons set out in Parts I to III of this brief. Their tactic requires the rewriting of federal law on habeas corpus and has been repeatedly determined by this Court to be fundamentally unsound.

CONCLUSION

In *California* v. *Krivda*, No. 71-651, amici respectfully request this Court, should it reach the issues, to affirm the decision on federal constitutional grounds.

In *Schneckloth* v. *Bustamonte*, No. 71-732, amici respectfully request this Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 1972

IN THE

Supreme Court of the United States

OCT 4 1972

MICHAEL RODAK, JR., CLERK

October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S REPLY BRIEF

ARGUMENT

I

Certiorari Has Been Providently Granted

Respondents contend that certiorari has been improvidently granted because, as they assert, the California Supreme Court's decision rests upon an independent and adequate non-federal ground.[1] (Resp. Br. pp. 52-

[1]At the outset, this argument should have been advanced as a "ground why the cause should not be reviewed" in the brief in opposition to the petition for writ of certiorari. Revised Rules of the Supreme Court of the United States, Rule 24, subd. 1. By withholding this claim until this late hour, the respondents force this Court and opposing counsel to utilize the limited time set aside for a thorough consideration of the merits in order to explore a threshold question which reasonably appeared to have been conceded at the certiorari stage. *Cf. Conway v. Calif. Adult*

(This footnote is continued on next page)

56, 63-80, 91-94. *See also* Brief of California Public Defenders Association [hereinafter CPDA Br.], pp. 1-24; Brief of National Legal Aid and Defender Association [hereinafter NLADA Br.], pp. 4-6.) Petitioner submits that this argument is untenable.

A. The Search and Seizure Article of the California Constitution Was Not an Independent Basis of the California Supreme Court's Decision

The main thrust of respondent's argument is that the decision of the California Supreme Court may have been based upon article I, section 19 of the California Constitution and *People v. Cahan,* 44 Cal. 2d 434, 282 P.2d 905 (1955), as well as federal Fourth Amendment principles. Thus asserting a possible state law basis for the decision of the Court below, the respondents invoke the principle that the jurisdiction of this Court fails where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, and the non-federal ground is independent of the federal ground and adequate to support the judgment. *Dept. of Mental Hygiene v. Kirchner,* 380 U.S. 194, 198 (1965); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *see also Berea College v. Kentucky,* 211 U.S. 45, 53

Authority, 396 U.S. 107, 110 (1969). Ordinarily a contention not raised in the brief in opposition will not be considered by this Court. *Wiener v. United States,* 357 U.S. 349, 351 n. (1958). *Cf.* Rule 23(1)(c); *J. I. Case Co. v. Borak,* 377 U.S. 426, 428-29 (1964); *Namet v. United States,* 373 U.S. 179, 190 n. 11 (1963). But since the presence of an independent non-federal ground of decision may deprive this Court of jurisdiction to review the state court judgment, *Jankovich v. Toll Road Comm'n.,* 379 U.S. 487, 491 (1965), it nevertheless appears that this question may be considered despite its untimely presentation.

(1908); *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590, 636 (1875).

Any assessment of the validity of this claim must begin with the opinion of the California Supreme Court. In *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 98-99 (1938), this Court observed:

> ". . . since the amendment of the judiciary act of 1789 by the act of February 5, 1867 it has always been held this Court may examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the court rested its judgment on an adequate non-federal ground." (Footnotes omitted.) *See also Black v. Cutter Laboratories,* 351 U.S. 292, 298 (1956).

Such an examination of the opinion in *People v. Krivda,* 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), will disclose that it contains not a single reference to article I, section 19 of the California Constitution or to *People v. Cahan, supra.* Instead the opinion is quite clearly based on federal rather than state law. The Fourth Amendment to the United States Constitution is the only constitutional provision mentioned by Mr. Justice Burke in the majority opinion. Moreover, the opinion is explicit in its reliance upon the "reasonable expectation of privacy" test formulated by this Court and having its origin in Mr. Justice Harlan's concurring opinion in *Katz v. United States,* 389 U.S. 347, 361 (1967). (*See* Pet. Op. Br., pp. 21-23, for historical development of the doctrine.) The dis-

senting opinion of Chief Justice Wright further underscores the exclusive Fourth Amendment basis of the majority opinion when he writes:

> ". . . I do not agree, however, that the area protected by the Fourth Amendment proscription of unreasonable searches and seizures encompasses parkways immediately adjacent to public thoroughfares or pedestrian walkways or that the police action enlisting the assistance of authorized trash collectors in separately picking up trash placed at the curb for pickup transmuted the collection into an unreasonable seizure." (*People v. Krivda, supra,* 5 Cal. 3d at 367-68, 96 Cal. Rptr. at 69, 486 P.2d at 1269.)

Lacking textual support for their position in the opinion of the court below, respondents argue that *People v. Edwards,* 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969) and *People v. Bradley,* 1 Cal. 3d 80, 81 Cal. Rptr. 457, 460 P.2d 129 (1969) were based in part on state law. Since the *Krivda* opinion cites both of these decisions, respondents contend that *Krivda* must therefore be found to rest in part on state law grounds. Of course, this argument ignores the following language in Justice Burke's opinion for the court below:

> ". . . We conclude that the principles of Edwards and Bradley, to the extent that they depend upon like principles in Katz v. United States, supra, may properly be applied to test the validity of the search and seizure at issue herein." *People v. Krivda, supra,* 5 Cal. 3d at 365, 96 Cal. Rptr. at 67, 486 P.2d at 1267.

The clear import of Justice Burke's words is that *Edwards* and *Bradley* were applicable to the instant case only insofar as those decisions were compelled by this Court's decision in *Katz*. Thus, it is readily apparent that the court below based its judgment exclusively on federal grounds. Accordingly this Court has jurisdiction to review this case where, as here, the state court might have based its decision on a non-federal ground but did not in fact do so. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938); *Int'l. Steel Co. v. Nat'l. Surety Co.*, 297 U.S. 657, 666 (1936); *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *See also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 375-76 (1968).

Respondents then argue that the California Supreme Court may impose more stringent standards for searches and seizures than are required by this Court in interpreting the Fourth Amendment. (Resp. Br. pp. 72-75.) In *Cooper v. California*, 386 U.S. 58, 62 (1967), this Court stated:

> "Our holding, of course, does not affect the State's power to impose higher standards of searches and seizures than required by the Federal Constitution if it chooses to do so. . . ."

In the present case, however, this proposition is no talisman capable of warding off review. As has been shown above, the California Supreme Court based its decision in this case on its view of what was required by federal law. Nothing in the opinion manifests an intention to go beyond the mandate of the Fourth Amendment.

B. No Special California Definition of "Abandonment" Serves as an Adequate State Law Basis for the Decision Under Review

Respondents contend that the *Krivda* decision rests upon a special California definition of "abandonment" which this Court is bound to accept. (Resp. Br. pp. 52-53.) Hence they claim that the decision rests on a question of local law not reviewable by this Court.

This contention lacks merit. The opinion states that "The placement of one's trash barrels onto the sidewalk for collection is not . . . necessarily an abandonment of one's trash to the police or general public." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. This observation was made in the context of determining whether the discovery of marijuana in the trash was the product of an unlawful search or seizure. Therefore, California's resolution of the abandonment issue is not binding on this Court.

Upon appeal from a state court, this Court has jurisdiction to review or independently determine all questions on which a federal right is necessarily dependent. *United States v. Pink,* 315 U.S. 203, 217-18 (1942). In *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 121 (1954), it was held that this Court has the duty to decide for itself the facts or constructions upon which federal constitutional issues rest. This Court specifically applied this rule to the search and seizure field. In *Ker v. California,* 374 U.S. 23, 34 (1963), Mr. Justice Clark wrote for the Court:

> ". . . While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination

> of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. . . ."

The determination of whether respondents' trash was abandoned at the time of its collection is preliminary to and so closely connected with the ultimate resolution of the search and seizure issue here that it is unquestionably part of the first federal question presented for review, and not an independent state law ground for the California Supreme Court's decision.

C. The Judgment of the Court Below Is Not Independently Grounded Upon a State Interpretation of Local Ordinances

In its opinion, the California Supreme Court adverted to the fact that many municipalities have local ordinances which regulate the collection of garbage. *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Respondent suggests that the interpretation placed upon these ordinances by the California Supreme Court is another purportedly adequate state law ground frustrating this Court's jurisdiction. (Resp. Br. pp. 64-67, 80.) The opinion quite clearly does not rely upon the interpretation of the garbage ordinances as a ground of decision. In the context of the opinion, these ordinances are merely cited as support for the lower court's thesis that respondents had a reasonable expectation of privacy in the trash which was ultimately searched. Under the authorities cited in the preceding section of this argument, this Court is entitled to draw its own conclusions as to the significance of such municipal ordinances.

II

Respondents' Trash Was Lawfully Examined in the Well of the Trash Truck

A. The Municipal Garbage Collection Ordinances Do Not Demonstrate That Respondents Had a Reasonable Expectation of Privacy in the Trash Searched in This Case

The existence of local ordinances regulating the disposal of trash and limiting the person authorized to collect it should not be construed as indicative of a general societal recognition of a privacy interest in one's discarded trash. When this case was before the California Supreme Court, Justice Burke referred to such ordinances, stating:

> "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860. ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (Id., § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. (Footnote omitted.)

First of all, it should be noted that the Los Angeles County ordinances mentioned in the California Su-

preme Court's opinion did not apply to the disposal of respondents' trash because the respondents' home was located in the City of Los Angeles and not in an unincorporated area of the county.[2] Thus, ordinances of the City of Los Angeles govern the removal of respondents' garbage.[3] Two city ordinances prohibited the tampering with garbage containers by persons other than the owner or his agents, the trash collector, or city officers or employees. Los Angeles Municipal Code §§ 66.03, 66.28. By the express terms of these ordinances, city officers such as policemen were exempt from the operation of these two ordinances.

Secondly, it is by no means clear that these ordinances were enacted to protect the privacy expectations of householders. A more logical inference is that this type of ordinance was enacted as a public health measure to control litter. The early California case of

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[2]It has long been established that this Court may take judicial notice of the boundaries and territorial limits of municipalities. *See Griffing v. Gibb*, 67 U.S. (2 Black) 519, 523 (1862). *Cf. Deutch v. United States*, 367 U.S. 456, 470 (1961). The street address of respondents' house was 1901 Nolden. (App. p. 27.) The street maps of the Los Angeles metropolitan area show that address to be located within the City of Los Angeles.

[3]*In Ex parte Roach*, 104 Cal. 272, 277, 37 Pac. 1044, 1046 (1894), the California Supreme Court held that the organization of a city within the boundaries of a county resulted in the withdrawal of the territory thus organized from the legislative control of the county. Article XI, section 7 of the California Constitution provides that "A county or city may make and enforce within its limits all local, police, *sanitary*, and other ordinances and regulations not in conflict with the general laws." (Emphasis added.) This section has been held to vest broad authority in the cities to enact municipal ordinances giving them the exclusive right to collect garbage within their respective boundaries. *Matula v. Superior Court*, 146 Cal. App. 2d 93, 98-99, 303 P.2d 871, 874 (1956).

In re Zhizhuzza, 147 Cal. 328, 81 Pac. 955 (1905), indicates that public health objectives were probably paramount in the enactment of such ordinances. In that case, the California Supreme Court stated:

> "The removal and disposition of garbage, as well as the regulation of slaughter-houses in cities and towns, is peculiarly a subject of municipal control, as without proper regulation either might become an intolerable nuisance and dangerous to the health and lives of citizens." *Id.* at 335, 81 Pac. at 958.

While on the California Court of Appeal, the author of the California Supreme Court opinion in this case relied upon *Zhizhuzza* in upholding municipal garbage disposal regulations as a valid exercise of the police power safeguarding public health. *Silver v. City of Los Angeles,* 217 Cal. App. 2d 134, 138-141, 31 Cal. Rptr. 545, 548-49 (1963) (per Burke, P.J.).

This Court has also recognized that public health considerations were instrumental in leading to the adoption of local ordinances regulating disposal and destruction of garbage and other refuse. *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306, 316-17, 319-24 (1905). *See also* Annot., *Regulation and Licensing of Private Garbage or Rubbish Removal Services,* 83 A.L.R. 2d 799, 801-02 (1962). Thus, municipal ordinances restricting the right to collect trash are equally as susceptible to a public health interpretation as to the privacy interpretation given

them by the California Supreme Court. Absent any authoritative legislative history on the subject, the public health interpretation appears to be the more persuasive. *Cf.* dissenting opinion of Chief Justice Wright, *People v. Krivda, supra,* 5 Cal. 3d at 368 n. 1, 96 Cal. Rptr. at 69, 486 P.2d at 1269.

B. The Garbage Collectors Were Not Police Agents

It is also contended that the trash collectors acted as police agents in this case. (CPDA Br. pp. 39-44.) But since petitioner argues that the trash examined by the police had been abandoned prior to its collection (Pet. Op. Br. pp. 11-20), it is not necessary to reach this issue. Whether the garbage collectors were police agents is relevant only to fixing the point in time prior to which the abandonment had to have occurred. If the garbage collectors were police agents, the trash had to have become abandoned property prior to its collection. If they were not, the abandonment had to occur prior to the police examination of the trash in the well of the trash truck. Since, as petitioner contends, the trash was abandoned as soon as respondent Minor placed it on the curb for collection, the status of the trash collectors need not be determined since their activities took place subsequent to the abandonment of respondents' trash.

Conclusion

For the reasons expressed in both of petitioner's briefs, petitioner urges that the judgment of the California Supreme Court be reversed.

Respectfully submitted,

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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-651

State of California, Petitioner, *v.* Judith Krivda and Roger T. Minor. | On Writ of Certiorari to the Supreme Court of California.

[October 24, 1972]

PER CURIAM.

On the basis of evidence obtained in a police search of respondents' trash, respondents were charged with possession of marihuana in violation of § 11530 of the California Health and Safety Code. The Supreme Court of California affirmed the superior court's judgment of dismissal and order suppressing the evidence on the grounds that, under the circumstances of this case, respondents "had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant." *People* v. *Krivda*, 5 Cal. 3d 357, 366–367, 96 Cal. Rptr. 62, 68, 486 P. 2d 1262, 1268 (1971) (*en banc*). We granted certiorari. 405 U. S. 1039.

After briefing and argument, however, we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States or upon the equivalent provision of the California Constitution, or both. In reaching its result in this case, the California court cited pertinent excerpts from its earlier decision in *People* v. *Edwards*, 71 Cal. 2d 1096,

80 Cal. Rptr. 663, 458 P. 2d 713 (1969) (*en banc*), which relied specifically upon both the state and federal provisions. 5 Cal. 3d, at 367, 96 Cal. Rptr., at 69, 486 P. 2d, at 1269. Thus, as in *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S. 194, 196–197 (1965), "[w]hile we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate. *Mental Hygiene Dept.* v. *Kirchner*, *supra*; *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *State Tax Commission* v. *Van Cott*, 306 U. S. 511 (1939). We intimate no view on the merits of the Fourth and Fourteenth Amendment issue presented.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

The petitioner herein respectfully petitions this Court for a rehearing of the above entitled cause, and urges the following grounds for rehearing:

Article I, Section 19 of the California Constitution Was Not an Independent or Adequate State Law Ground Capable of Supporting the Decision of the California Supreme Court

In the *per curiam* decision rendered in this case on October 24, 1972, this Court stated ". . . we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States or upon the equivalent provision of the California Con-

stitution, or both." For this reason, the judgment of the Supreme Court of California was vacated and the cause was remanded to that Court for appropriate further proceedings.

A careful reexamination of article I, section 19 of the California Constitution as interpreted by the California Supreme Court should lead this Court to conclude that that section was not a possible non-federal ground for the lower court's decision. No California case has ever held that article I, section 19 contains or requires an exclusionary rule analogous to the exclusionary rule held to be required by the Fourth and Fourteenth Amendments to the United States Constitution. The landmark decision of *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), expressly rejected any constitutional basis for the rule that it proclaimed. In *Cahan*, Mr. Justice Traynor wrote for the Court:

> ". . . It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of constitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." (44 Cal. 2d at 442, 282 P.2d at 910.)

In so holding, the California Supreme Court eschewed any and all reliance upon article I, section 19 of the California Constitution as a possible basis for the exclusionary rule in California. Since *Cahan*, no California case has held that the search and seizure clause of article I, section 19 to require a state exclusionary rule analogous to the federal rule made applicable to the States in *Mapp v. Ohio*, 367 U.S. 643 (1960). Indeed, the California Supreme Court recently

declined to consider the question of whether California's vicarious exclusionary rule was required by article I, section 19 of the California Constitution. *Kaplan v. Superior Court*, 6 Cal. 3d 150, 161 n. 9, 98 Cal. Rptr. 649, 656, 491 P.2d 1, 8 (1971). When the California Supreme Court declined to attribute a state constitutional basis even to this local rule of standing, its action unmistakably indicated a reaffirmation of the choice made in *Cahan* not to predicate the exclusionary rule upon the state constitution.

It its *per curiam* opinion, this Court was troubled by the language of *People v. Edwards*, 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969), wherein the California Supreme Court stated:

> ". . . Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. . . ." *Id.* at 1105, 80 Cal. Rptr. at 638, 458 P.2d at 718.

The statement that the search "violated" the state constitution cannot be interpreted as indicating that the exclusion of evidence was compelled to remedy the violation of that provision. Numerous California cases prior to *People v. Cahan, supra*, stated that various unreasonable searches violated article I, section 19 of the California Constitution, but nevertheless held that no exclusionary rule was compelled by the state search and seizure clause. *People v. Kelley*, 22 Cal. 2d 169, 172, 137 P.2d 1, 3 (1943); *People v. Gonzalez*, 20 Cal. 2d 165, 168-69, 124 P.2d 44, 46-47, *cert. denied*, 317 U.S. 657 (1942); *People v. Mayen*, 188 Cal. 237, 241-253, 205 Pac. 435, 436-441 (1922); *People v. Le Doux*, 155 Cal. 535, 546-48, 102 Pac. 517.

521-22 (1909). Hence the mere statement in *People v. Edwards, supra,* that police conduct violated the search and seizure clause of the California Constitution does not indicate that article I, section 19 was an independent and adequate state law basis for the California Supreme Court's decision upholding the exclusion of evidence in the instant case.

Since California neither before nor since the *Cahan* decision has found an exclusionary rule to be required by article I, section 19 of the California Constitution, there can really be no ambiguity as to the basis of the California Supreme Court's decision. When *Mapp v. Ohio,* 367 U.S. 643 (1960) held that the Fourth Amendment exclusionary rule was enforceable against the states through the Fourteenth Amendment, California ceased to have any separate or independent rule in this area. It must be emphasized that *Cahan* enunciated a judicially declared rule of evidence having no basis whatsoever in the California Constitution. *Mapp v. Ohio* subsumed *Cahan* within the broader requirements of the Fourteenth Amendment. Since *Mapp,* the California Supreme Court has never considered the question of whether the exclusionary rule is also compelled by the California Constitution. In the absence of a holding that the exclusionary rule is so compelled as a matter of state law, one can only conclude that the decision of the court below rested upon federal constitutional provisions alone.

To remand this case to the California Supreme Court at this juncture would simply afford the court below an opportunity to decide a question of first impression and to insulate its decision from review in this forum. Thus, this Court's present decision departs from

the general rule that this Court has jurisdiction to review a case where, as here, the state might have based its decision on a non-federal ground but did not in fact do so. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938); *Int'l. Steel Co. v. Nat'l. Surety Co.*, 297 U.S. 657, 666 (1936); *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *See also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 375-76 (1968).

Conclusion

For these reasons, petitioner urges that a rehearing be granted and that this Court reverse the judgment of the California Supreme Court.

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END OF CASE